In the Supreme Court of the United States

OCTOBER TERM—1940.

CITY OF INDIANAPOLIS, *et al.*,
Petitioners,

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., *et al.*,
Respondents.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Cross-Petitioner,

v.

CITIZEN'S GAS COMPANY OF INDIANAPOLIS, *et al.*,
Respondents.

10, 11, 12 & 13

Nos. ~~421, 422, 423, and 424.~~

REPLY BRIEF OF CHASE NATIONAL BANK, TRUSTEE, RESPONDENT AND CROSS-PETITIONER.

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TABLE OF ABBREVIATIONS.

In addition to the abbreviations and designations used in our original brief (see Pl. Br. pp. 1 and 2 and page facing p. 1) we shall use the following abbreviations:

Cit. Gas Br.	Brief of Citizens Gas Company of Indianapolis, Respondent and Cross-Respondent.
City Br.	Brief of City of Indianapolis, *et al.*, Petitioners and Cross-Respondents, dated December 28, 1940.
Ind. Gas Br.	Brief of The Indianapolis Gas Company, Respondent, dated January 20, 1941.
Pl. Br.	Brief of Chase National Bank, Trustee, Respondent and Cross-Petitioner, dated December 7, 1940.

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INTRODUCTION.

We shall confine ourselves in this Reply Brief to a consideration of the "assigned errors intended to be urged" by the City (City Br. 13-14), and to the argument advanced by Indianapolis Gas to the effect that the unpaid and overdue coupons should bear interest at 5% rather than 6% (Ind Gas Br. 82-3).

The brief of Citizens Gas requires no comment. The Circuit Court of Appeals held that the Lease is "valid and enforceable against" Citizens Gas and that plaintiff is entitled to "a coercive judgment for the unpaid and overdue interest coupons" against Citizens Gas (IV R. 1307-8). Citizens Gas has not sought a review of that decision and it is conclusive upon it in all respects. It apparently does not contend otherwise.

Counsel for the various defendants have by their silence accepted as accurate the statement of the case set forth in our original brief (Pl. Br. 2-24). It will be necessary, however, for us to point out certain inaccuracies appearing in the City's brief before proceeding to the argument.

Correction of Inaccuracies and Omissions in City's Brief.

1. The statement that the sole purpose of Citizens Gas "was to act as trustee of a public charitable trust" and that it "had no power or authority to act otherwise" (City Br. 5) is inaccurate and misleading. Citizens Gas was primarily a public utility incorporated "to supply the city of Indianapolis and its inhabitants with light, heat and power" (1 R. 95), although it also had certain duties and responsibilities as trustee of the public charitable trust. This situation is correctly summarized in the brief of Citizens Gas (p. 6):

> "(4) Since Citizens Gas was a public utility as well as the original Trustee of the Public Charitable Trust, the lease in question was made pursuant to the authority of the Public Service Commission Law of Indiana and only after approval had been given by the Public Service Commission of Indiana (1 R. 116-122). The propriety of this was adjudicated in *Williams v. Citizens Gas Company, et al.*, 206 Ind. 448, 188 N. E. 212."

Under the law of Indiana, the state's power over Citizens Gas as a public utility transcended the rights of the beneficiaries of the public charitable trust. Citizens Gas, therefore, had power to make the Lease when the state specifically conferred that power by the adoption of the Shively-Spencer Act (Pl. Br. 57, 67, 144), and when the Public Service Commission approved the making of the Lease. It is immaterial whether Citizens Gas had previously enjoyed such power (Pl. Br. 66-9; *infra*, pp. 37-9).

2. The statement that "On September 30, 1935 Indianapolis Gas agreed to make an arrangement for temporary use," of its property (City Br. 9), is wholly unsupported by the record and contrary to the facts. The letters exchanged between the City and Indianapolis Gas on September 30th (DX Stip. 64 and 65, III R. 968-9; Offered, II R. 384-5) merely agreed that the payments which the City was then making and was expecting to make in the future would be without prejudice to the rights of either of the parties. In accepting the payments, Indianapolis Gas said (DX Stip. 65, III R. 969):

> "* * * you making these or future payments referred to without prejudice to your position or rights and we accepting the same without prejudice to our position or rights under said lease or in any relation thereto."

Thus, the only agreement made was that the *payments* were to be made and accepted without prejudice to the rights of either of the parties. This agreement was in no sense "an arrangement for temporary use."

As a matter of fact, these letters were not exchanged until three weeks after the City had accepted the assignment of the Lease, recorded it, and taken possession of the leased property, so that the reservation contained in both letters preserved to Indianapolis Gas the rights which it had secured by the City's previous action in accepting the assignment of the Lease.

3. The agreement of March 2, 1936, referred to by the City, is the first agreement of any sort between Indianapolis Gas and the City with respect to the temporary use or continued operation of the property. In referring to this agreement (City Br. 11), counsel for the City have carefully quoted the paragraph which provided that continued operation should be without prejudice to the City's rights, but have omitted the similar paragraph with respect to the rights of Indianapolis Gas. The latter paragraph reads (I R. 207):

> "It is further understood that your acceptance of this agreement and of such payment and your agreement that such sums may be deposited in escrow and that we may operate the plant referred to *shall not prejudice your position or rights** and that you are at full liberty to assert, notwithstanding this agreement and the payment made in pursuance thereof, that said lease is a valid and binding lease upon the City of Indianapolis and said Department of Utilities of said City or against any property of either in accordance with its terms."

Since this agreement specifically provided that it was without prejudice to the rights of the parties, it cannot be tortured into any waiver of the rights accruing to Indianapolis Gas through the City's accepting and recording the assignment of the Lease and taking possession of the leased property, almost six months before.

4. The statement that "The action of the Board of Directors rejecting the lease was ratified by an ordinance of the common council of the City" (City Br. 10) is only a half truth. The fact is that the City Council ratified and confirmed all that the Board of Directors for Utilities did in taking over and accepting the public charitable trust (DX 8, III R. 1018-19; Offered, II R. 429). Thus the City Council "ratified, approved, adopted and confirmed" the action of the Board of Directors for Utilities:

(1) In offering the City's Revenue Bonds for sale upon the express representation that the City was taking over the "property owned by Citizens Gas Company of Indianapolis and/or in which it has an interest, * * *" (Pl. Br. 17).

(2) In representing, in connection with the sale of the City's Revenue Bonds, that the system which it was taking over was "* * * in part owned by Citizens Gas Company and in part is leased by it from Indianapolis Gas Company, * * *" (Pl. Br. 18).

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* Emphasis appearing in quotations throughout this brief is ours unless otherwise indicated.

(3) In executing the Indemnity Agreement in which it agreed to save Citizens Gas harmless against all its liabilities (Pl. Br. 21).

(4) In accepting and recording the assignment of the Lease and taking possession of the leased property (Pl. Br. 107-111).

(5) In accepting and recording the instruments of conveyance transferring all property of Citizens Gas, which conveyances were expressly made subject to "all other legal obligations of the Citizens Gas Company" (Pl. Br. 112-14).

The City Council was in no better position to "keep its cake and eat it" than was the Board of Directors for Utilities and in ratifying and confirming all the acts done in taking over the property of the public charitable trust it necessarily approved the acts of the Board of Directors and the legal consequences flowing therefrom.

5. Counsel for the City say (City Br. 12) "The bill does not allege that the lease is valid, * * *" and then go on to state that the plaintiff is predicating its rights merely upon laches, estoppel, and *res judicata*. This statement as to the allegations of plaintiff's Bill, *even if true*, would be wholly without significance. There was no occasion for plaintiff to allege *in haec verba* that the Lease was valid. Such an allegation would have been merely a conclusion of law and wholly devoid of significance.

The fact is, however, that from the time of the filing of the original Bill, continuously to the present time, plaintiff has been contending that the Lease is valid and binding on the original parties thereto, upon the City of Indianapolis as successor trustee, upon the trust property, and upon Citizens Gas. Thus in paragraph 19 of the Bill (I R. 17-18) it is alleged that "*upon the execution and delivery of said 99-year lease*" the Mortgage Trustee became vested with certain distinct and independent rights against "the lessee, its successors and assigns." Obviously, the mortgagee acquired rights growing out of the

acceptance of this 99 year Lease only because it was a valid and binding obligation of the parties thereto.

The second prayer of the Bill asked expressly that the Lease be found a valid and binding obligation upon all of the defendants (Bill, I R. 20-21). The City has continuously recognized that plaintiff was asserting that the Lease was valid and binding. Thus the City's counter-claim states (I R. 183, 3rd paragraph):

> "That the plaintiff, The Chase National Bank of the City of New York as Trustee under said Mortgage and Deed of Trust securing bonds of The Indianapolis Gas Company * * * is asserting that said lease is valid and binding, * * *."

In answer to the City's counter-claim plaintiff stated (I R. 214): "* * * but plaintiff denies that the aforesaid lease was void when executed or is now void in any respect whatever, * * *."

These statements show that there has never been any real doubt as to the plaintiff's contention.

6. The statement that "* * * there was a definitely fixed date for the termination of its [Citizens Gas's] trusteeship" (City Br. 16, 44) is unsupported by the record and contrary to fact. As pointed out in our original brief (Pl. Br. 63-4) there were five possible contingencies which would result in the City's succeeding Citizens Gas as trustee, none of which was certain to occur. All of those contingencies except one depended upon the City's exercise of its rights, and that was an uncertain matter, since it involved the raising of funds and the assumption of obligations. The City admitted in its brief filed in the Circuit Court of Appeals that "At the time this lease was executed, it was not known and could not have been known that the City would exercise its right to take over the trust."*

7. In specifying the assigned errors the City (City Br. 14) complains of the supposed error of the Circuit

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* City's Brief in Cause 7143 in Circuit Court of Appeals, p. 52.

Court of Appeals "In holding a municipal corporation liable for 77 years for future payments of more than $45,000,000 * * *." In so far as this statement indicates that a liability is imposed upon the City of Indianapolis payable out of revenues raised by taxation, it is contrary to fact and wholly unsupported by the record. Both the opinion and the orders of the Circuit Court of Appeals make it clear that the primary liability is imposed upon "(1) The City *as successor Trustee* and the Trust Property;" (IV R. 1306; 1307, 1308). Indeed, the Court of Appeals amended its opinion after the filing of the City's first Petition for Rehearing by inserting the words "as Successor Trustee" after the words "the City" to make the limitation of liability entirely clear (cf. IV R. 1335 and 1306, line 34). The City does not attempt to support its suggestion that any liability is imposed upon the City payable out of revenues raised by taxation, as distinguished from liability imposed on the trust property and the City as successor trustee.

In so far as the City's statement includes the suggestion that it will be necessary to pay $45,000,000 in rent over a period of 77 years for the use of the Indianapolis Gas property, it is wholly immaterial to any issue before the Court. The fact that interest on $10,000,000 at 5% for 20 years will total $10,000,000 or in 80 years will total $40,000,000, has no relevance in determining whether the rate of 5% is either lawful or reasonable or whether the obligation was validly assumed.

As pointed out in our original brief (pp. 65-66), the leasing of the Indianapolis Gas property was vastly more economical for Citizens Gas than selling its own stock to purchase the same property. That a substantial amount of rent is paid for the Indianapolis Gas property is more than offset by the fact that the lessee receives tremendous revenues from the Indianapolis Gas property which constituted in 1913, when the Lease was made, and still con-

stitutes a very large part of the combined system resulting from the leasing of the Indianapolis Gas property. In this connection the following facts are significant:

(1) The City admits (City Br. 46) that the Indianapolis Gas property "was twice the size of that of Citizens Gas" when the Lease was made in 1913.

(2) In 1913, when the Lease was made, Indianapolis Gas had 41,541 meters in use, as compared with 11,165 for Citizens Gas (PX 93, III R. 901, Offered II R. 342; Stip. 5 (b), II R. 621).

(3) At the end of 1913 Indianapolis Gas had 387.34 miles of mains, as contrasted with 184.52 miles of mains for Citizens Gas (PX 93, III R. 901).

(4) On June 30, 1913, the total assets and the property of Citizens Gas were worth $2,781,480 and $2,521,170, respectively (PX 92, p. 4, physical exhibit, not printed; Offered, II R. 342). In 1913 the Public Service Commission of Indiana determined that the Indianapolis Gas Bondholders and stockholders were entitled to a 5% return on $4,833,000 of Bonds and a 6% return on $2,000,000 of stock, so that the value of the Indianapolis Gas property was obviously more than twice that of Citizens Gas.

Thus it is apparent that the City's talk about paying an aggregate of $45,000,000 for interest, dividends, and taxes in connection with the Indianapolis Gas property over a period of 77 years has no real bearing upon the merits of the controversy.

We shall have occasion to correct other inaccuracies in the City's statements during the course of the following argument.

ARGUMENT.

I. THE CIRCUIT COURT OF APPEALS PROPERLY REFUSED TO REALIGN INDIANAPOLIS GAS WITH CHASE AS A PARTY PLAINTIFF.

(Pl. Br. 38-45.) (Ind. Gas Br. 27-29.)
(City Br. 22-32.)

As we have seen (Pl. Br. 40-43), any one of the numerous controversies between plaintiff and Indianapolis Gas would preclude a realignment of Indianapolis Gas. A mere statement of these controversies is sufficient in and of itself to remove all possible doubt as to federal jurisdiction of this case. In addition to plaintiff's prayer for a decree declaring the Lease to be binding on *all* the defendants, the relief sought which creates a definite adversity of interest between plaintiff and Indianapolis Gas includes the following:*

1. A declaration that the rights of Indianapolis Gas under the Lease are part of the security for the Bonds (Prayer 3, I R. 21).

Here is a clash of interests as to what assets of Indianapolis Gas are covered by its Mortgage.

2. An order, pending final judgment, restraining Indianapolis Gas from interfering with the Lease in any way (Prayer 4, I R. 21).

The danger of such interference is shown by some of the correspondence between the City and Indianapolis Gas (PX Stip. 66, III R. 838, Offered, II R. 329; DX Stip. 68, III R. 970, Offered, II R. 433-4). The agreement of March 2, 1936 (Exhibit E, I R. 205, Offered, II R. 386) shows that before this suit was filed Indianapolis Gas did

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* An order of the District Court (II R. 321-2) reserved some of the issues in this case for trial at a later date. Among the issues so reserved are Nos. 1, 3, 6, 7 and 8 hereinafter enumerated, and the issue as to plaintiff's right to recover its expenses and attorney's fees (see No. 5, p. 10. *infra*).

not hesitate to attempt to make modifications in the Lease in complete disregard of the rights of the Bondholders.

The City asserts that plaintiff does not fear any adverse action by Indianapolis Gas, since plaintiff has taken no steps to procure the temporary injunction for which it prays (City Br. 26). While it is true that the actual issuance of an injunction was not sought, any adverse action by Indianapolis Gas was forestalled and plaintiff's rights were adequately protected by the filing of the Bill and the prayer for injunction.

> *Merrimack River Savings Bank v. City of Clay Center*, 219 U. S. 527, 536 (1911).

3. A declaration that the contract of March 2, 1936 has no effect on the rights of the Bondholders under the Lease (I R. 259, Par. (4)).

The Lease requires the lessee to pay the bond interest *to the Bondholders* (I R. 69, Par. 21; I R. 72, Par. 22), but this contract makes *all* the rent payable to Indianapolis Gas (I R. 206, Par. (b)).

4. A decree ordering the City to pay to *plaintiff* all the interest payments becoming due thereafter (Prayer 7, I R. 21).

The agreement of March 2, 1936 reveals the necessity for establishing and enforcing plaintiff's right to receive part of the rent paid under the Lease, as against any claim of Indianapolis Gas thereto.

5. A judgment for the unpaid interest, with interest on the unpaid interest, and for plaintiff's expenses and attorney's fees (Prayer 8, I R. 21; Prayer 10, II R. 301).

6. A judgment for all losses caused by the failure of Indianapolis Gas to make, or cause to be made, the repairs and renewals necessary to properly maintain the mortgaged premises (Prayer 10, II R. 301).

7. An order compelling Indianapolis Gas to apply to the satisfaction of all judgments against it in this case all

of its assets, of whatever nature, including $120,000 of Bonds, its interest in the escrow fund being accumulated under the contract of March 2, 1936, and its right to recover from the City for the use of its property, whether under the Lease or otherwise (Prayer 12, II R. 302).

8. A declaration that any of the assets of Indianapolis Gas remaining after the satisfaction of the judgments against it are part of the security for the Bonds, and also an order sequestering any such surplus assets until Indianapolis Gas shall have given adequate security for the ultimate discharge of its obligations under the Mortgage (Prayer 12, II R. 303-4).

The City is obviously wrong when it says (City Br. 23): "The real and controlling controversy in this case is whether the pleaded lease has become enforceable against the City." Issues 5, 6, 7 and 8 just enumerated have nothing to do with the validity of the Lease and they are much too important to be ignored in determining the question of federal jurisdiction.

Since plaintiff has these numerous controversies with Indianapolis Gas, Indianapolis Gas could not be realigned as a plaintiff, even if it were in accord with plaintiff in some of the other controversies. We have pointed out that (Pl. Br. 40): "The City has never cited a single case in which the plaintiff had even one substantial controversy with a defendant and such defendant was realigned with the plaintiff for jurisdictional purposes," and that statement still stands.

The City relies entirely on *Sutton v. English*, 246 U. S. 199 (1918), claiming that (City Br. 30): "the attitude of the parties toward what this Court characterized as the actual and substantial controversy determined whether there should be realignment" in that case. This "actual and substantial controversy" was *the only controversy* between plaintiffs and the defendant sought to be realigned (see Pl. Br. 41-2). The fact that their clash of interest in

this one controversy *prevented* a realignment does not support the City's argument that a similarity of interest in a single controversy *requires* a realignment. On the contrary, since a clash of interest in one controversy prevents realignment, where such clash of interest appears there can be no realignment because of any similarity of interest in any other controversies in the same case. As a matter of fact, there was a similarity of interest in three of the four controversies in *Sutton v. English*, and this Court nevertheless ruled that no realignment was required.

The fact that plaintiff sought and obtained a judgment *against* Indianapolis Gas which will now amount to more than $1,700,000 is sufficient in and of itself to prevent a realignment of Indianapolis Gas, and there are numerous other controversies between plaintiff and Indianapolis Gas. The City argues (City Br. 26) that ample funds to pay the judgment can be obtained from the escrow fund and the operation of the utility property, and that Indianapolis Gas is therefore "wholly insulated from any liability." This argument presupposes that federal jurisdiction is dependent in some way upon the ultimate collectability of the various defendants. Obviously, both the principal and surety on an obligation are properly sued *as defendants*, without regard to the solvency or collectability of either.

The City argues further that since the liability of Indianapolis Gas is secondary to that of the City as trustee, the trust property, and Citizens Gas, the judgment of the Court of Appeals "amounts in substance *not to a judgment against Indianapolis Gas, but one in its favor*" (City Br. 26, italics are the City's). This assertion suggests another method of testing the soundness of the City's argument. Even if Indianapolis Gas had secured a judgment holding that it was *not* liable for the overdue and unpaid interest, the fact of such a judgment would have no effect on the question of jurisdiction. Federal jurisdiction is determined with reference to the controversies presented by the plead-

ings and not with respect to the ultimate decision of those controversies. For example, the amount in controversy necessary to sustain federal jurisdiction is determined by the amount claimed, and the amount actually recovered is wholly immaterial.

> *Scott v. Donald*, 165 U. S. 58, 89 (1897);
> *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U. S. 283, 288 (1938).

Similarly, the presence of a federal question essential to federal jurisdiction depends upon the issues presented by the pleadings, and it makes no difference that the federal question is determined adversely to plaintiff or is not even determined at all.

> *Siler v. L. & N. R. R. Co.*, 213 U. S. 175, 191 (1909);
> *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103, 105 (1933).

As shown by these well established rules, the presence of a controversy which sustains federal jurisdiction is not negatived by the ultimate decision of such controversy adversely to the plaintiff.* Just as a decision that Indianapolis Gas is not liable for the unpaid interest would have no effect on federal jurisdiction of this case, so the decision that the liability of Indianapolis Gas is only secondary has no effect on federal jurisdiction.

The fallacy of the City's argument that jurisdiction must be determined with reference to the ultimate decision of the merits is readily apparent. If the City had prevailed in its contention that the Lease is invalid (as it did in the District Court), plaintiff's recovery would have been confined to Indianapolis Gas alone and the City would apparently concede the existence of jurisdiction. On the other

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* This is well illustrated by a case in which jurisdiction of a single defendant is based on diversity of citizenship. In such a case federal jurisdiction is not destroyed merely because the defendant is successful on the merits.

hand, since the City's contentions were denied and the Lease was held valid, so that Citizens Gas, the trust property, and the City as trustee were also held liable for the unpaid interest, the City insists that Indianapolis Gas is no longer a proper party defendant, although a judgment is still rendered against it. Thus it should be noted that while the City was asserting that Indianapolis Gas should be aligned as a plaintiff, it was at the same time contending that Indianapolis Gas was the only party liable for the indebtedness which plaintiff sought to recover. If the City had prevailed in its contentions both as to jurisdiction and the merits, it would have been necessary to realign as a party plaintiff the *only* party liable to Chase. The absurdity of the position thus taken by the City clearly reveals the fallacy of its arguments on this question.

There can be no real doubt concerning federal jurisdiction of this case. Plaintiff is entitled to an adjudication of the rights which it asserts against Indianapolis Gas, and the adverse relationship created by the assertion of those rights precludes any realignment of Indianapolis Gas as a party plaintiff.

II. THE CITY HAD AMPLE OPPORTUNITY TO BE HEARD ON THE QUESTION WHETHER THE ALLEGED BURDENSOMENESS OF THE LEASE WAS A VALID DEFENSE AND THE COURT OF APPEALS' DIRECTION TO ENTER FINAL JUDGMENT WITHOUT A RETRIAL OF THAT ISSUE WAS IN FULL ACCORD WITH DUE PROCESS OF LAW.

(Pl. Br. 45-56) (Ind. Gas Br. 29-61)
(City Br. 32-43).

It may be helpful in analyzing the City's so-called constitutional question to determine just what the City is contending and what it is not contending. It is clear from the City's brief, its assignment of errors, and the grounds relied upon in its petitions for certiorari that:

The City contends:

(1) That the Circuit Court of Appeals had no right to decide as a matter of law that the alleged burdensomeness of the Lease was not a valid defense and direct a final judgment, because

(a) It was necessary for the District Court to pass on this question of law before it could constitutionally be passed on by the Court of Appeals (City Br. 40);

(b) The District Court did not pass on the question of law (City Br. 41).

(2) That in so far as the decision of the Circuit Court of Appeals was based on the prior adjudication in the *Williams* case, such decision was unwarranted because

(a) "The question of *res adjudicata* is a question of fact" (City Br. 39);

(b) The City had no opportunity to be heard on the question of *res judicata* in the District Court (City Br. 17, 39).

The City does not contend and has made no assignments of error entitling it to contend:

That the decision of the Court of Appeals that the alleged burdensomeness is not a valid defense was in itself an erroneous decision.

Let us consider for a moment the significance which attaches to the City's failure to make this contention.

The City concedes "that the issue of burdensomeness * * * was decided against the City by the Circuit Court of Appeals." (City Br. 17). This means that the Court decided that the alleged burdensomeness was not a valid defense *as a matter of law*, since there is no claim that the question of *fact* was passed upon. The City does not con-

tend that this question of law was erroneously decided, nor does the City attempt to answer the argument in our original brief (Pl. Br. 50-54) showing that the allegations of burdensomeness presented no valid defense. It is perhaps a fair inference that the City has no answer.

Even if the Circuit Court of Appeals had erroneously decided the question of burdensomeness or had erroneously failed to consider it at all, no constitutional question as to due process would be involved, but only an erroneous decision in the course of a judicial proceeding. Thus, in *Collins v. Johnston*, 237 U. S. 502 (1915), this Court was reviewing an order of the District Court denying appellant's petition for a writ of *habeas corpus*. The appellant contended that he had been "deprived of due process of law in violation of the Fourteenth Amendment, in that the trial court arbitrarily denied and refused to consider a valid and legally conclusive defense offered by him upon the trial of the second indictment" (p. 506). In answer to this contention this Court said (p. 507):

> "Nor are we able to see that the refusal of the proffered defense, even were such refusal erroneous, could at all affect the jurisdiction of the court, or amount to more than an error committed in the exercise of jurisdiction. The averment that the defense was 'arbitrarily refused' merely states a conclusion of law, and is of no effect in the absence of facts sufficient to show that the ruling was in truth arbitrary; and no such facts are alleged."

In the case at bar the City does not even claim that the Circuit Court of Appeals decided the question of burdensomeness erroneously. Its sole contention is that the Court of Appeals had no *right* to decide the question. Reduced to its simplest elements, the City's contention is that the Circuit Court of Appeals had no right to pass upon the question whether the alleged burdensomeness of the Lease constituted a valid defense no matter how trivial or absurd that alleged defense might be, and that the Court was re-

quired to remand the case to the trial court to take evidence on a question which the Court believed to be wholly immaterial as a matter of law.

With this background we shall proceed to examine the City's contentions under the following headings:

(a) The City's contention that it was necessary for the District Court to pass on the question whether burdensomeness was a valid defense before the Court of Appeals could constitutionally pass upon it is unsound and contrary to the decisions of this Court.

(b) There is no factual basis for the City's supposed constitutional question, because the District Court did in fact rule on the defense of burdensomeness and its ruling was preserved for review by plaintiff's exception to the overruling of its motion to strike.

(c) The City's contention that the Circuit Court of Appeals should not have based its decision as to burdensomeness on *res judicata* is unsound, because there is no indication that the Court based its decision on that ground.

(d) To the extent, if at all, that the Circuit Court of Appeals based its decision upon the prior adjudication in the *Williams* case, it was fully justified in doing so since the parties had been fully heard in the District Court as to the effect of that adjudication.

(a) The City's Contention that it was Necessary for the District Court to Pass on the Question Whether Burdensomeness was a Valid Defense Before the Circuit Court of Appeals Could Constitutionally Pass Upon it is Unsound, and Contrary to the Decisions of This Court.

As pointed out in our original brief (Pl. Br. 48-49), the decision of this Court in *American Surety Co. v. Baldwin*, 287 U. S. 156, 168, establishes beyond question that a defense may properly be considered for the first time in

an appellate court. This case alone disposes of the City's argument and yet the City's brief makes no attempt to explain or distinguish this case or the rule announced therein.

There can be no doubt concerning the applicability of the rule of *American Surety Co. v. Baldwin* to a federal equity case. It has always been held that an appeal in an equity case invokes a hearing *de novo* and that the Court of Appeals is not limited to a mere review of the rulings of the trial court.

Thus, in *Alexander v. Redmond*, 180 Fed. 92 (C. C. A. 2nd, 1910), a trustee in bankruptcy brought a bill in equity to set aside an assignment as a preference. A jury was impaneled to try the issues and at the end of plaintiff's case defendants "rested subject to request for permission to reopen the case" and moved for a directed verdict, which was granted. On appeal the Court of Appeals reversed the trial court and ordered final judgment for the plaintiff. To the defendants' objection that they had had no opportunity to prove their defense, the court made this answer (p. 93):

> "This being an appeal in equity, the facts as well as the law are open for our consideration, as they would be even if the jury had rendered a verdict without direction, and the issues must be disposed of upon the record brought here from the circuit court. *No reservation of a motion to reopen the case extends to this court.* The circumstance that a jury was impaneled is immaterial. *Appeal in equity brings the cause here for final disposition.*"

Many other cases could be cited to the same effect, but we call the Court's attention to one. In *Lyon v. Union Gas & Oil Co.*, 281 Fed. 674 (C. C. A. 6th, 1922), the plaintiffs brought suit to quiet their title to certain premises and to enjoin defendants from setting up any claim by virtue of a certain oil and gas lease. The District Court dismissed the case and plaintiffs appealed. Plaintiffs had notified

the defendants that they must either proceed to develop the leased property or forfeit the lease. The Court of Appeals held that one of the material issues was whether a sufficient time had elapsed between the notice given by plaintiffs and the time when suit was brought. The Circuit Court of Appeals expressly held that although the trial court did not pass upon this issue, the court was free to determine that question. Thus the court said (p. 678):

> "While the trial court did not determine the question of the sufficiency of the time intervening between the notice and the commencement of this action, nevertheless this action is here upon appeal, and therefore *all issues presented by the pleadings and the evidence are before this court for adjudication.*"

Defendants had made no effort to prove in the lower court an excuse for failure to develop the property and "rested their case upon the testimony introduced by the plaintiffs." In the Court of Appeals defendants suggested in argument a number of causes for their delay but that Court held that the forfeiture of the lease was justified. Thus the lessees' defenses that they had not been allowed sufficient time and that they had some excuse for failure to develop the property were decided adversely to them by the Court of Appeals, although these questions had not been passed upon by the District Court.

There are many recent cases recognizing that a Court of Appeals may direct final judgment in an equity case or in a law case where the facts are not in dispute. See, for example:

Thornton v. Carter, 109 F. (2d) 316 (C. C. A. 8th, 1940);

Union Central Life Insurance Co. v. Imsland, 91 F. (2d) 365, 368 (C. C. A. 8th, 1937).

Under some circumstances, even when there is a constitutional right to a trial by jury, an appellate court may

direct the entry of final judgment on questions of law, although they were not considered by the lower court.

Forged Steel Wheel Co. v. Lewellyn, 251 U. S. 511, 516 (1920);

Baltimore & Carolina Line v. Redman, 295 U. S. 654 (1935).

Under the new rules of civil procedure the right of the Circuit Court of Appeals to direct the entry of final judgment, even in a jury case, has been enlarged, or at least has been somewhat simplified from a procedural point of view.

Montgomery Ward & Co. v. Duncan, 85 L. ed. 132, 138 (December 9, 1940).

It is a fundamental concept of our procedure that no one has a right to prove facts—even in a jury case—which will be unavailing if proved. The entry of judgments on demurrer, the granting of motions to strike immaterial claims or defenses, the rejection of evidence on the trial because of immateriality, and the entry of judgments on motions for judgment on the pleadings are all examples of this practice. The reports of this Court and of every common law court are replete with illustrations.

In *Fidelity & Deposit Co. v. United States*, 187 U. S. 315 (1902), this Court was reviewing a judgment for plaintiff entered by the Supreme Court of the District of Columbia because the defendant's affidavit of defense, required by rule of court, was inadequate. Defendant claimed that the rule was invalid because it deprived it of due process of law and the right of trial by jury. This Court denied those contentions and said (p. 320):

"* * * If it were true that the rule deprived the plaintiff in error of the *right* of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues. The purpose of the rule is

to preserve the court from frivolous defences and to defeat attempts to use formal pleading as means to delay the recovery of just demands.

"Certainly a salutary purpose and hardly less essential to justice than the ultimate means of trial." (Emphasis is the Court's.)

See also:

Smoot v. Rittenhouse, 27 Washington L. Rep. 741 (U. S. Supreme Court, 1876);

Souffront v. Compagnie des Sucreries, 217 U. S. 475 (1910).

The City's authorities distinguished.

None of the cases cited by the City has any tendency to support the City's contention that a hearing in the trial court on the question of law—whether burdensomeness was a valid defense—was an essential element of due process.

Harvey v. Elliott, 167 U. S. 409 (1896) (City Br. 37), involved the entry of a summary judgment as a punishment for contempt and the judgment was held void for want of due process.

In *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292 (1937) (City Br. 37), this Court held that the Commission had erred in entering a finding based on facts which did not appear in the record and in acting on "information secretly collected and never yet disclosed." The failure of the Ohio law to provide a review for such a determination was held to be a violation of due process.

In *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287 (1920) (City Br. 37-8), the Public Service Commission had prescribed a complete schedule of maximum rates which was legislative in character, based on a valuation of the utilities property. This Court held that "the State must provide a fair opportunity for submitting that

issue to a judicial tribunal," and that was the extent of the decision.

In *Bluefield Water Works and Improvement Co. v. Public Service Commission*, 262 U. S. 679 (1923) (City Br. 39), this Court held that a utility was entitled to a judicial review of both the law and the facts in determining whether the rates fixed by the Public Service Commission were confiscatory in character.

In *Montgomery Ward & Company v. Duncan*, 85 L. ed. 132 (December 9, 1940) (City Br. 42) the case was remanded to the District Court to rule on the motion for a new trial because that motion was addressed to certain questions which lay entirely within the discretion of the District Court (see p. 137).

In *Saunders v. Shaw*, 244 U. S. 317 (1917) (City Br. 37), this Court reversed a judgment of the Louisiana Supreme Court. The Louisiana Supreme Court had rendered judgment absolute against the party who succeeded in the trial court and this ruling was placed on "a proposition of fact which was ruled to be immaterial at the trial" and concerning which there had been no proper opportunity to introduce evidence. If the Circuit Court of Appeals had ruled on the issue of burdensomeness *as a matter of fact*, this case might have some pertinence, but the issue of burdensomeness was held to be immaterial *as a matter of law*.

In so far as this case is cited by the City to support its position that it seasonably raised the constitutional question, it lends no support to such contention. As we shall see later (*infra*, pp. 24-5), the issue as to the motion to strike was fully argued in the Circuit Court of Appeals without any suggestion from the City that that Court could not properly or constitutionally pass upon it. The City never contended that a ruling on the question of burdensomeness would violate the *Fifth* Amendment until it filed its Second Petition for Rehearing in the Circuit Court of Appeals (compare IV R. 1310, Par. 1 and IV R. 1346, Par.

3) and made its first claim of any constitutional right (*under the Fourteenth Amendment*) in its first Petition for Rehearing (IV R. 1310).

Cobbledick v. United States, 309 U. S. 323 (1940) (City Br. 40), is an authority against rather than in support of the City's position. This Court did not say, as the City indicates, that "an appeal is a matter of grace," but that "*the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice.*" (p. 325). It necessarily follows that the requirements of due process can be as completely satisfied by a hearing on a question of law in an appellate court as in a trial court. This is precisely what this Court held in *American Surety Co. v. Baldwin*, 287 U. S. 156 (*supra*, p. 17).

(b) There is no Factual Basis for the City's Supposed Constitutional Question, Because the District Court Did in Fact Rule on the Defense of Burdensomeness and Its Ruling was Preserved for Review by Plaintiff's Exception to the Overruling of I[illegible] Motion to Strike.

The City's supposed constitutional que[illegible] is based upon the assumption that the District Court did not rule upon the question of law whether the alleged burdensomeness of the Lease was a valid defense. The fact is, however, that the District Court did rule upon that question in denying plaintiff's motion to strike these allegations from the City's answer and counterclaim.

As pointed out in our original brief (pp. 47-48), plaintiff filed a motion to strike from the City's answer and counterclaim all the allegations asserting that the Lease was burdensome, and thereby squarely raised the issue whether the alleged burdensomeness would be a valid defense if proved (II R. 317). This motion was overruled by the District Court, to which action plaintiff excepted (II R. 320), and on its appeal plaintiff assigned this action

of the District Court as error (Points 1 and 2, III R. 1196).

The City seeks to raise the inference that plaintiff abandoned its motion to strike because it entered no formal exceptions to the order of January 18, 1939, on which the City bases its entire claim. This order did not reserve any issues of law previously decided on the motion to strike, but only deferred *the taking of evidence*. There is no basis for claiming that plaintiff's failure to take an exception* to this reservation can be construed as an abandonment of the exception previously taken to the important decision made by the District Court on the question of law involved in the motion to strike.

Certainly it was not so construed by the plaintiff or by the City in the course of the proceedings.

The propriety of the action of the District Court in overruling plaintiff's motion to strike was fully argued in the Circuit Court of Appeals. The City argued (Appendix A, *infra*, p. 67) that the ruling of the District Court was not reversible error, but there was no suggestion that the question could not properly or constitutionally be considered by the Court of Appeals. In support of the foregoing statement we have printed as Appendix A to this brief all of the discussion on this subject in any of the briefs filed in the Circuit Court of Appeals before the decision of that Court. These excerpts from the briefs filed in the Court of Appeals show how fully the question as to the motion to strike was argued in that court. There was no suggestion from anyone that the plaintiff had abandoned its motion to strike or that the question of law raised by the District Court's refusal to strike the allegations of burdensomeness was not properly before the Court of Appeals.

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*Of course, under Rule 46 of the new Rules of Civil Procedure no exception was necessary.

The City now claims (City Br. 36) "The City was not bound to contemplate a decision by the Circuit Court of Appeals of the reserved issue of burdensomeness before its evidence was heard."

The City was put on notice by the motion to strike, the exception to the overruling of that motion, the terms of the order of January 18, 1939, the assignment of errors in the District Court, and by the briefs in the Circuit Court of Appeals that plaintiff was still insisting on its motion to strike and that the Court of Appeals was requested to direct a final judgment. Thus, in the Circuit Court of Appeals, plaintiff concluded its argument on the motion to strike as follows (Appendix A, *infra*, p. 64):

> "We submit that the District Court erred in refusing to strike the City's allegations as to the burdensomeness of the Lease from its Answer and Counterclaim; and we submit that this Court should correct this error of the District Court to the end that there may be a speedy and final determination of this already too protracted litigation."

Notwithstanding the notice which the City thus received that plaintiff was insisting on its motion to strike and the right to have a final judgment directed, it was not until after the Court of Appeals had announced its decision that the City's counsel even suggested that the Court of Appeals did not have the right to pass on the question of law whether the allegations of burdensomeness constituted any defense.

The City had a hearing in the District Court on plaintiff's motion to strike, which presented the question of law whether the allegations of burdensomeness furnished any valid defense. Thus there is no factual basis for the City's contention that the Court of Appeals passed on this question of law before the District Court had done so.

(c) The City's Contention that the Circuit Court of Appeals Should Not Have Based its Decision as to Burdensomeness on Res Judicata is Unsound, Because There is no Indication that the Court Based Its Decision on that Ground.

The Circuit Court of Appeals would have been fully justified in deciding every issue as to the validity of the Lease, including the issue of burdensomeness, on the basis of the prior adjudication in the *Williams* case. There is, however, no justification for claiming that the Court based any part of its decision on the principle of *res judicata*.

The rule in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, announced in 1938, required that federal courts follow the state law as pronounced by the highest court of the state. That decision of this Court was urged upon the Court of Appeals by plaintiff and the defendants. We submit that the Court was applying that rule, rather than any doctrine of *res judicata*, when it cited the *Williams* and the *Fishback* cases. We call attention to the language of the Court itself (IV R. 1299-1300):

> "However, another point arises where as here the trustee has the power to make leases. In making a long term lease a trustee is under a duty to act with prudence. If a trustee makes a lease which is unreasonable under the circumstances, he thereby commits a breach of trust. For this a trustee incurs liability to the beneficiaries who in addition may have such a lease set aside. This record discloses that the trustee was justified in selecting the mode of acquisition which it did. When the prudence point was urged before the Indiana Supreme Court, that court did not find the lease in question unreasonable as to time or as to its other terms. *Williams v. Citizens Gas, et al.*, 206 Ind. 448, 458, 460.
>
> "We therefore conclude that the trustee had the power to make the long-term lease in question and that this particular leasehold interest in the Indianapolis Gas property is part of the trust *res*. In passing it

might be said that the few cases discussed in the opinion above are determinative of the immediate issue here, *i.e.*, as to the validity of the 99 years lease. See in particular *Fishback v. Public Service Commission, et al.*, 193 Ind. 282; *Williams v. Citizens Gas, et al.*, 206 Ind. 448; *Todd v. Citizens Gas, et al.*, 46 F. (2) 855; *Chase Nat. Bank v. Citizens Gas, et al.*, 96 F. (2d) 363, 365. No amount of verbal magic resorted to by counsel for the City will avail to brush aside the barrier these cases present to him. Nor have we overlooked the various admissions and apparent inconsistencies of the City during the history of this gas utility controversy in the courts and before the administrative bodies, but these points we find unnecessary to the decision herein reached."

Obviously, in citing the *Fishback* and the *Williams* cases, the Circuit Court of Appeals was merely applying the Indiana law as laid down by the courts of Indiana. In both of those cases, brought by beneficiaries of the public charitable trust, the Indiana courts decided that allegations as to the burdensomeness of the Lease were no basis for setting the Lease aside or declaring it invalid.

There is much talk throughout the City's brief concerning the failure of the Circuit Court of Appeals to follow the Indiana law. The fact is, however, that the established law of Indiana compelled the conclusion which the Circuit Court of Appeals reached and this is particularly true as to the alleged defense of burdensomeness.

As pointed out in our original brief (Pl. Br. 51-52, 90-92), the order of the Indiana Public Service Commission determining that the Lease was in the public interest is conclusive under the law of Indiana and cannot be attacked in a collateral action. *Public Service Commission v. Indianapolis*, 193 Ind. 37, 43; 137 N. E. 705, 707. The City itself admits this (City Br. 70-71).

In both the *Fishback* and the *Williams* cases the Lease was attacked by beneficiaries of the public charitable trust on the ground, among others, that it was burdensome. In

both cases the courts of Indiana refused to hear evidence in support of such ground of attack. These decisions were undoubtedly based, among other things, on the settled law of Indiana that there could be no collateral attack upon the determination of the Public Service Commission.

Fishback v. Public Service Commission, 193 Ind. 282; 138 N. E. 346, 139 N. E. 449;

Williams v. Citizens' Gas Company, 206 Ind. 448; 188 N. E. 212.

There can be no doubt that the *Williams* case was decided upon that ground, among others, since the Supreme Court of Indiana there said (188 N. E. 216):

"* * * Further it was within the jurisdiction of the public service commission to consider and approve the lease and the complaint discloses that the public service commission did approve it."

We submit that in disposing of the issue of burdensomeness the Circuit Court of Appeals was deciding that *as a matter of Indiana law, as established by the courts of Indiana*, the Lease was valid and the defense based upon alleged burdensomeness was wholly inconsequential.

(d) To the Extent, if at all, that the Circuit Court of Appeals Based Its Decision upon the Prior Adjudication in the Williams Case, it was Fully Justified in Doing so Since the Parties had been Fully Heard in the District Court as to the Effect of that Adjudication.

Even if we suppose, for the purpose of argument, that the Circuit Court of Appeals rested its decision as to burdensomeness solely on the question of *res judicata*, such action would be fully justified. The fact that the decision in the *Williams* case is *res judicata* of the issues presented in the case at bar has been discussed elsewhere (Pl. Br. 75-89, *infra*, pp. 50-55). We shall confine ourselves here to considering the City's contentions that "The question of

res adjudicata is a question of fact" (City Br. 39) and that "The scope and effect of the issues in the *Williams* case could not be passed on initially by the appellate court" (City Br. 42).

The fact is that the question of the effect of the *Williams* case was fully presented in the District Court and there is no factual basis for the City's contention that it was denied an opportunity to present the facts. Thus, whether, as the City contends, "The question of *res adjudicata* is a question of fact" becomes wholly immaterial, since the City had a full opportunity to try that fact in the trial court. The fact that the *Williams* case was *res judicata* was expressly pleaded by the plaintiff (I R. 18, Par. 20) and denied by the City (I R. 159-161), and the facts as to the parties and pleadings in the *Williams* case were established by a Stipulation signed by all the parties in the case at bar (Stip. 14, II R. 630-633). The Stipulation shows in detail the parties to the cause (Par. 14 (a) and (b)), sets out or incorporates all of the pleadings in the cause, states the facts as to the decisions of the Superior Court and the Supreme Court of Indiana, and states that the final judgment of the Superior Court, which was affirmed by the Supreme Court, "has never been modified, reversed or set aside, but is now in full force and effect" (Par. 14 (j), II R. 633).

The City objected to the admission of the evidence contained in subdivision 14 of the Stipulation and all of the exhibits incorporated therein on the ground that the facts thus proved did not warrant a decision that the *Williams* case was "*res adjudicata* on the questions here involved" (DX 29, III R. 1052-3, Par. 4). Thus there can be no doubt that the City knew the purpose for which this evidence was offered, and had full opportunity to offer any countervailing evidence which it could produce. The Stipulation of facts (PX 1, II R. 616, Offered II R. 326) was dated February 15, 1939 (II R. 639) and had, of course, been in preparation long before that time, and the trial did not com-

mence until March 2, 1939 (II R. 323). Hence the City had ample opportunity to prepare any evidence which it wished to offer in opposition to the stipulated facts relating to the *Williams* case.

Entirely aside from the question of the *evidence* presented to the District Court, it affirmatively appears that the *City* submitted to the District Court the question whether the *Williams* case was *res judicata* and requested the Court to make findings and conclusions on that question. Thus City's requested Finding 33 (III R. 1091-2) contained elaborate findings in regard to the *Williams* case, including a finding that (p. 1092):

> "* * * None of the questions involved in this case were actually litigated in the *Williams* case nor could such questions have been litigated under the issues in that case."

Finding 33 as requested by the City was adopted almost verbatim by the District Court, with some additions thereto, and the part quoted above was adopted *in haec verba* (Finding 40, III R. 1178-9).

The City also specifically requested the District Court for a conclusion of law that the *Williams* case was not *res judicata* "of the validity and binding effect of the lease upon the City" (No. 1, III R. 1102). The District Court adopted this requested conclusion, merely expanding it to include Citizens Gas as well as the City (No. 2, III R. 1190).

Thus the City expressly tendered to the District Court the issue whether the *Williams* case was *res judicata* of the issues here presented and obtained a decision from the District Court to the effect that the case was not *res judicata*. There is, therefore, no basis for the City's contention that "The scope and effect of the issues in the *Williams* case" were passed upon for the first time by the appellate court (City Br. 42).

In concluding this branch of the discussion it is important to observe that the City has made no attempt to meet the argument presented in our original brief (Pl. Br. 46-47, 50-51) that the reserved issue has become moot and is wholly immaterial. The only question reserved by the order of the District Court was whether the City "had the right as such successor trustee *to refuse and reject an assignment of such lease* on the ground that such lease was burdensome." As pointed out in our original brief (p. 51), the City did not "refuse and reject an assignment of such lease." On the contrary, the City accepted the assignment of the Lease, had it recorded, and went into possession of the leased property and has been operating it ever since. Beyond that, as held by the Circuit Court of Appeals (IV R. 1300-1301), the City, in electing to take the trust property, necessarily elected to take the Lease which was an integral part of the trust estate.

The City's contention that it should be released from the obligations of the Lease because they are inconvenient or burdensome can best be answered in the language of this Court in *Rees v. City of Watertown*, 19 Wall. 107 (1873), in which a municipal corporation was attempting to escape from its obligations on the ground that the payment of them would be inconvenient or burdensome. In disposing of that question this Court said (p. 116):

> "Upon a class of the defences interposed in the answer and in the argument it is not necessary to spend much time. The theories upon which they proceed are vicious. They are based upon the idea that a refusal to pay an honest debt is justifiable because it would distress the debtor to pay it. A voluntary refusal to pay an honest debt is a high offence in a commercial community and is just cause of war between nations. So far as the defence rests upon these principles we find no difficulty in overruling it."

We submit that there is no basis in fact for the City's contention that the question of law—whether burdensome-

ness was a defense—was not passed upon by the District Court, and there is no basis in law for the City's contention that the Circuit Court of Appeals was not free to pass on that question of law if the District Court had not ruled upon it.

III. CITIZENS GAS HAD AMPLE AUTHORITY TO EXECUTE THE LEASE AND THE LEASE IS ENFORCEABLE AGAINST THE CITY AS SUCCESSOR TRUSTEE.

(Pl. Br. 56-74, 93-8.) (Ind. Gas Br. 62-75.)
(City Br. 43-52.)

The significance of the City's argument as to the powers of Citizens Gas and the enforceability of the Lease against the City lies in the City's failure even to attempt to deal with several facts of vital importance to the determination of these questions. For example, the City concedes, as we have shown (Pl. Br. 56, 63), that the Lease was valid during the trusteeship of Citizens Gas, and we have pointed out that a trustee's contract, valid when made, does not become a nullity merely because of a change in trustees. The City has made no attempt to show how this Lease, admittedly valid during the 22 years of the trusteeship of Citizens Gas, could suddenly become invalid when the City succeeded Citizens Gas as trustee.

Likewise, we called attention to the importance of the conduct of Citizens Gas and the City during a period of 22 years as showing their practical construction of the powers of Citizens Gas (Pl. Br. 79). We also pointed out that the City has consistently ignored the fact of this practical construction (Pl. Br. 118). Although the City presents an extensive argument on the question of estoppel (City Br. 53-66), it still pays no attention to the fact that both Citizens Gas and the City have construed the Franchise and Articles of Citizens Gas as giving Citizens Gas the power to execute the Lease and make it binding on the trust for its full term. Under the law of Indiana, "it is the

duty of a court, where the language of a contract is indefinite or ambiguous, to adopt the construction and practical interpretation which the parties themselves have put upon the contract."* Thus, this practical construction of the contract between the City and Citizens Gas and the City's failure to make any reference thereto are of vital importance.

(a) The Franchise and Charter Powers of Citizens Gas Included the Power to Execute the Lease and Make It Binding Upon the Trust For the Full Term of the Lease.

(Pl. Br. 58-66.) (City Br. 43-52.)

The basis of the City's argument on this question is its assertion that a grant by a municipality is strictly construed against the grantee (City Br. 49). The alleged refusal of the Court of Appeals to apply the Indiana law on this subject is listed as one of the "assigned errors intended to be urged" by the City (City Br. 14). The City presents this argument once more, in complete disregard of *City of Vincennes v. Citizens' Gaslight Co.*, 132 Ind. 114, 31 N. E. 573, a case reviewed in our original brief (Pl. Br. 58). In that case the Supreme Court of Indiana expressly held that where, as in the case at bar, a franchise contains a contract with the municipality as well as a grant to occupy the streets, such contract is "construed and interpreted like any other written contract." The City's failure even to mention this case indicates that it cannot deny that the law of Indiana is in fact directly contrary to its contention.

The City does not hesitate to go to the absurd extremes necessarily involved in its theory that Citizens Gas

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* *City of Vincennes v. Citizens' Gaslight Co.*, 132 Ind. 114, 31 N. E. 573, 576 (Pl. Br. 58, 72). In this case, as in the case at bar, the contract in question was one between a private corporation and a municipality in the State of Indiana.

had no powers other than those specifically enumerated in its Articles. Thus, the City says (City Br. 51):

> "Thus, if the terms of the trust remain silent on a trustee's powers, as the Circuit Court of Appeals said, and which is the fact, the power to make the lease cannot be implied."

In other words, since the terms of the trust are silent as to the trustee's powers and no powers can be implied, the trustee was without any powers whatever. The absurd situation which the adoption of the City's theory would have created reveals the fallacy of that theory.

The fact that the Franchise contained detailed provisions as to the use of the streets and the company's transactions with its customers (City Br. 51) sheds no light on the question whether Citizens Gas had the power to enter into a lease. The City's assertion (City Br. 51) that the Articles contained detailed provisions as to the order in which the earnings of Citizens Gas should be used and the duties of its officers is wholly unfounded. The Articles merely state the order in which certain general classes of expenditures and disbursements shall be made, the first in order being "the payment of matured debts and operating expenses" (I R. 98, Par. IX). Clearly, the rent coming due under the Lease is one of the "matured debts and operating expenses" thus given priority in the disbursement of the earnings of Citizens Gas. As for the duties of the officers, the City's reference (City Br. 51) to the record in support of its assertion is to Article IV of the *By-Laws* (I R. 103), which are not part of the Articles and are therefore not included in the contract between Citizens Gas and the City. There were no such provisions in the Articles themselves (I R. 95-100).

The City's contention that Citizens Gas was intended to continue indefinitely as a competitor of Indianapolis Gas (City Br. 44) is wholly unfounded. The fact of the desire to deprive Indianapolis Gas of its monopoly does not show

an intention to preclude the citizens' own gas company from taking over Indianapolis Gas and thus placing the public charitable trust in complete control. If the City sincerely believed that the trust instruments required competition between the public charitable trust and Indianapolis Gas, it would never have made its covenant with the holders of its Revenue Bonds to "use all reasonable efforts to resist competition and maintain the exclusive right to serve gas in the City of Indianapolis" (PX Stip. 47, III R. 828; offered, II R. 327). In short, the City has searched the Franchise and Articles of Citizens Gas in vain in its endeavor to find some implication that Citizens Gas had no power to execute the 99-year Lease.

The City's assertion that there was a fixed date for the expiration of the trusteeship of Citizens Gas (City Br. 44, Par. (5)) has already been shown to be wholly unfounded (Pl. Br. 63, *supra*, p. 8). Unable to find a case in which a lease was held improper because extending beyond *the term of the trustee* who made it, the City now contends that the Lease violates the rights of remaindermen (City Br. 48). No rights of remaindermen are here involved. The City is correct when it says that it is the successor trustee of this trust (City Br. 44, Par. (6)). The trust is a perpetual, charitable trust, and there is no provision for the City or anyone else to turn the trust estate over to any remainderman at any time. On the other hand, the case of *In re Hubbell*, 135 Iowa 637, 113 N. W. 512,* on which the City relies (City Br. 48-9), involved a *private trust* and the trust itself would have ended before the termination of the lease there involved. The *Hubbell* case itself points out the distinction between that case and the case at bar (p. 522):

> "* * * As hereinbefore noted, the decisions with reference to charitable trusts afford no aid, for the

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* The opinion of the Circuit Court of Appeals contains a careful and accurate analysis of this case and its applicability to the case at bar (IV R. 1298-9).

trust period in these is indeterminable, and the length of the lease is considered only as bearing upon the reasonableness of its provisions and of the rentals stipulated. Such leases have been approved where otherwise reasonable with terms varying from 80 to 1,000 years. See *Atty. Gen. v. South Sea Co.*, 4 Beav. 453; *City of Richmond v. Davis*, 103 Ind. 449, 3 N. E. 130."

The "Additional Authorities of City of Indianapolis,"* just received, have no bearing upon the power of Citizens Gas to make the Lease or upon the question whether it is enforceable against the City. The authorities cited relate wholly to *private* trusts and the power of a trustee *as lessor* to make a long term lease of the trust estate. In general, these authorities deal with the question whether a trustee may make a lease extending beyond the life of the trust. They have no bearing upon and no tendency to support the City's contention that a trustee *as lessee* may not make a lease which will extend beyond the term of his trusteeship, though not beyond the duration of the trust.

When a trustee of a private trust makes a lease of the trust property extending beyond the life of the trust, questions are involved as to the respective rights of the beneficiaries entitled to the income and those ultimately entitled to the principal. No such question is involved in the case at bar which involves a charitable trust continuing indefinitely. The authorities cited are clearly within the distinction pointed out by the Circuit Court of Appeals in dealing with *In re Hubbell*, 135 Iowa 637; 113 N. W. 512, upon which the City relies. In discussing that case, the Court of Appeals said (IV R. 1299):

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* These authorities, cited in support of the proposition that the Lease is unenforceable against the City, are:

Scott—The Law of Trusts (1939) Vol. II, Section 192, page 1010;

Restatement of the Law—Trusts—Vol. I, Section 189 (c), page 499.

"* * * The *Hubbell Trust* case does not stand for the proposition that a trustee has no power to lease for a term of years. At the most it stands for the rule that a trustee has no power to lease trust property for a term of years exceeding the period of the trust. It does not take much comparison to see that such a rule does not support the proposition here urged, namely, that the trustee lacked the power to lease beyond its period of trusteeship.

"Moreover in the instant case the trustee's power to acquire a long-term leasehold interest is in issue, not the trustee's power to lease trust property for a long term of years."

It is clear under the authorities that a trustee has power to make a lease which may extend beyond his term of office, and the City has never cited any authority which casts any doubt on the power of Citizens Gas to make the Lease here in question.

(b) The Express Statutory Power of Citizens Gas to Enter Into the Lease for 99 Years Overrode the Limitations, If Any, Arising From the Public Charitable Trust.

(Pl. Br. 66-69.) (City Br. 49-50.)

The City contends that the charter of Citizens Gas was not altered by the enactment of the Public Service Commission Law and cites *Todd v. Citizens' Gas Co.*, 46 F. (2d) 855, in support of this contention (City Br. 49). The *Todd* case merely held that the public charitable trust and the rights vested in the beneficiaries thereof were not destroyed when Citizens Gas surrendered its Franchise. That holding is wholly immaterial to the question at issue in this case. Also, as we have seen (Pl. Br. 68), the court in that case was careful to point out (p. 868):

"We are not dealing with the question of the power which the state might have exercised with respect to vested property rights created in the public interest as an inducement to the grant, if it had seen fit to do so.

The supreme authority of the state over both proprietary and governmental functions of its agency, the municipality, is not to be gainsaid."

Moreover, the City's contention is directly opposed to well established Indiana law. In *Williams v. Citizens' Gas Co.*, 206 Ind. 448, 188 N. E. 212, the Supreme Court of Indiana held that Williams, a beneficiary of the trust here in question, and the beneficiaries for whom he spoke, held whatever interest they might have in Citizens Gas subject to the state's power to control that company as a public utility. Thus the court said (p. 215):

> "* * * the class of beneficiaries of which appellant is a member hold whatever interest they may have in the Citizens' Gas Company subject to the power of the state to control the Citizens' Gas Company as a public utility."

It is significant that the City makes no reference to this holding by the Supreme Court of Indiana.

In this connection, it should be noted that the power of the State of Indiana to control public utilities extends to those owned or operated by municipalities. Thus, under the provisions of the Public Service Commission Law (Sec. 1, Pl. Br. 142), the public utilities subject to that Law include those municipally owned or operated. Examples of the application of this Law to municipal public utilities are to be found in the recent cases of *City of Huntington v. Northern Indiana Power Co.*, 211 Ind. 502, 5 N. E. (2d) 889 (1937) and *Public Service Co. v. New Castle*, 212 Ind. 229, 8 N. E. (2d) 821 (1937). This means that the public charitable trust, being a public utility enterprise, is subject to the state's paramount power of control and that both Citizens Gas and the City have been at all times subject to control by the state in their conduct of that enterprise.

In addition, as a matter of Indiana law, the statute conferring express power to make the Lease (Sec. 95½, Pl. Br.

144) became part of the charter of Citizens Gas as soon as it was enacted. This fact is clearly established by *Westport Stone Co. v. Thomas*, 175 Ind. 319, 94 N. E. 406 (1911), and *Denny v. Brady*, 201 Ind. 59, 163 N. E. 489 (1928), cases cited in our original brief (Pl. Br. 61-2), but not even mentioned in the City's brief.

Its Articles and its Franchise gave Citizens Gas ample authority to make the Lease. Beyond that, all possible doubts as to the powers of Citizens Gas in this respect were removed by the grant of express statutory authority to enter into this Lease for 99 years (Pl. Br. 56-8, Subhead (a)).

(c) The Williams Case Conclusively Determined That Citizens Gas Had Power to Execute the Lease and Make It Binding Upon the Trust For the Full Term of the Lease.

(Pl. Br. 69-70.)

The *Williams* case conclusively determined, *as a matter of Indiana law*, that Citizens Gas had power to execute the Lease and make it binding on the trust for its full term of 99 years (Pl. Br. 69-70). The City argues that the judgment in the *Williams* case is not *res judicata*,* but it fails to answer the proposition advanced in our first brief (Pl. Br. 89) that the decision in that case established the law of Indiana applicable to the precise facts and issues here presented. The City does claim that "the enforceability of the lease against the City" was not litigated in the *Williams* case (City Br. 75-6), but this claim was shown to be without any foundation (Pl. Br. 76-9), before the City repeated it once more in its brief on the merits in this Court.

The decision in the *Williams* case—that the public charitable trust was not entitled to have removed this

* There can be no doubt that the decision in the *Williams* case is *res judicata* in the case at bar (Pl. Br. 75-89, *supra*, pp. 28-30, *infra*, pp. 50-55).

alleged "unlawful cloud upon the title of said Municipal City, as trustee" (PX Stip. 35, II R. 772, Offered, II R. 328)—is an authoritative statement of the law of Indiana as to the binding effect of the Lease on the City as successor trustee. As such it is a binding precedent in all federal courts.

(d) The Statutory Prohibitions on Which the City Relies Have No Application to the Case at Bar.

(Pl. Br. 93-8.) (City Br. 45-8.)

The City's contention (City Br. 47) that the Lease itself was prohibited by Sections 85 and 254 of Chapter 129 of the Acts of 1905 (quoted Pl. Br. 147-9) is obviously absurd. These statutes relate solely to contracts to which a municipality is a party and, as the City points out (City Br. 44), the City was not originally a party to the Lease. Moreover, any prior prohibitions on this subject were swept aside by the enactment of the Public Service Commission Law in 1913, shortly before the Lease was executed. This Law defines "public utility" to include municipally owned or operated public utilities (Sec. 1, Pl. Br. 142), and under this Law the City itself could have entered into the Lease in 1913.

When the City took over the trust property in 1935, the question was not whether the City had the power to execute the Lease, but rather whether the City had the power to take over the trust property subject to the obligations under the Lease. The latter question must be answered in the affirmative. As we have seen (Pl. Br. 94-5), Section 53 of Chapter 129 of the Acts of 1905 (quoted Pl. Br. 147) gives cities express power to receive public trusts "and to agree to conditions and terms accompanying the same and bind the corporation to carry them out." The City accepted the public trust here in question and expressly stated that it "hereby agrees to the conditions and terms accompanying such trust and acknowledges itself bound to

carry them out" (DX 8, III R. 1018-19, Offered, II R. 429). Beyond that, the validating acts of 1929 (quoted, Pl. Br. 150-5), prepared by counsel for the City for this very purpose (Pl. Br. 101-3), remove all possible doubt as to the power of the City to accept the trust property subject to the obligations under the Lease.

Here again, the City has adopted the expedient of ignoring the facts which disprove its contentions. With the exception of a footnote reference to Chapter 77 of the Acts of 1929 (City Br. 7), made in another connection, the City's brief makes no mention of Section 53 of Chapter 129 or of either of the validating acts of 1929 (Chapters 77 and 78). This is all the more remarkable in view of the fact that the Circuit Court of Appeals laid particular emphasis upon the validating acts of 1929. Thus the court said (Opinion, IV R. 1288, footnote):

> "In fact this legislation expressly authorized the transfer of utility property (held in fee or by virtue of a lease) under circumstances peculiarly similar to the factual situation existing between Citizens Gas, Indianapolis Gas and the City in the instant case. If the legislators had had in mind the exact factual situation here involved, they could not have passed more appropriate legalizing and enabling legislation."

The City's contentions based on Sections 85 and 254 of Chapter 129 of the Acts of 1905 (City Br. 45-48) are wholly unfounded.

IV. THE RULE OF ERIE RAILROAD CO v. TOMPKINS REQUIRED THE DECISION THAT THE LEASE IS VALID AND BINDING AND IN SUSTAINING THE VALIDITY OF THE LEASE THE CIRCUIT COURT OF APPEALS FULLY COMPLIED WITH THAT RULE.

(Pl. Br. 74-92, 118-134) (Ind. Gas Br. 77-9) (City Br. 52-86).

The rule of *Erie Railroad Co. v. Tompkins*, on which the City relies, required the decision of the Court of Appeals that the Lease is valid and binding. In fact, the Court of Appeals could have come to a contrary decision only if it had completely disregarded that rule and the settled law of Indiana. Every Indiana decision and statute relevant to the issues raised in this case compels the conclusion that the Lease is valid and binding for its full term. The *Williams* case alone conclusively negatives, *as a matter of Indiana law*, all the City's *present* contentions as to the validity of the Lease (Pl. Br. 76, 89).

We have already discussed the City's contentions that the Court of Appeals did not follow the Indiana law that a grant by a municipality must be taken most strongly against the grantee (*supra*, pp. 33-7; Pl. Br. 58-66), and that the court refused to follow certain provisions of the Acts of 1905 (*supra*, pp. 40-41; Pl. Br. 93-8). There are three other questions as to which the City claims the court refused to follow the Indiana law, namely, the question of estoppel, the question of the effect of the approval of the Lease by the Public Service Commission, and the question of *res judicata* (City Br. 13, Par. 4). Since it is certain that the Court of Appeals reached its conclusion that the Lease was valid and binding independently of any of these principles, it is clear that the decision of that court would not be disturbed, even if the City were to prevail in its arguments on these questions. We shall, however, show briefly that the court did not depart from the Indiana law as to any of these questions.

(a) The Circuit Court of Appeals Did Not Depart From the Indiana Law in Dealing With the Question of Estoppel of a Municipal Corporation.

(Pl. Br. 118-129; (Ind. Gas Br. 77-8) (City Br. 53-66).

One of the alleged errors assigned by the City is the supposed refusal of the Court of Appeals to follow the Indiana decisions on "the question of estoppel of a municipal corporation" (City Br. 13, Par. 4(a)). However, the City admits (City Br. 53, footnote): "The Circuit Court of Appeals made no express holding on the question of estoppel *in pais*." Thus, the City is assigning error for failure to follow the Indiana law with respect to a question on which the court below made no holding. Obviously, that court cannot have refused to follow the Indiana law on a question as to which it made no holding.

In our original brief we called attention to the fact that the City had made no reference to the importance of the conduct of Citizens Gas and the City during the 22-year period from 1913 to 1935 as (a) showing their *practical construction* of the powers of Citizens Gas, (b) showing their *practical construction* of the City's exercise in 1929 of its right to take over all the trust property, including the Lease, and (c) precluding them from denying the validity of the Lease, because of their *laches* (Pl. Br. 118). The significance of the City's extended argument on the question of estoppel lies in the fact that the City is still studiously avoiding any discussion of the conduct of Citizens Gas and the City from these points of view.*

Even the City's argument on the question of estoppel ignores many significant facts which are sufficient in them-

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* The City's assertion (City Br. 63, Par. (j)) that it advised Citizens Gas of its intention to reject the Lease, a short time before it took over the trust property in September, 1935, is no answer to the laches of Citizens Gas and the City during the 22 years preceding any such announcement (Pl. Br. 129-132).

selves to estop the City. What the City actually does (City Br. 53-64) is to enumerate and later attempt to explain several things upon which plaintiff does not rely as a basis for an estoppel, but it fails to mention or explain many of the matters upon which plaintiff principally relies. For example, the City does not even mention its failure to object to the Lease until after it had been in effect for over 21 years, the insertion of at least one provision in the Lease at the instance of the City, the City's acts in requiring compliance with that provision, and its insistence upon the validity of the Lease in the *Fishback* case and in the *Williams* case (Pl. Br. 124-6).

The City contends (City Br. 63-4) that there can be no estoppel if the other party was not influenced by the acts pleaded as estoppel. This rule and the Indiana cases cited in support thereof do not preclude a decision that the City is estopped to deny the validity of the Lease. As we have shown in our original brief (pp. 123-4), where representations in regard to a material matter have been made in the course of a transaction, it is assumed in the absence of evidence to the contrary that the representations were relied on. The City cites no Indiana cases which purport to cast any doubt on the validity of this well established rule.

The representations that Citizens Gas had a 99-year Lease of the mortgaged property and that it guaranteed the payment of the interest and the refunding of the principal of the mortgage Bonds were, to say the least, material representations. The City and Citizens Gas bore the burden of showing that the representations in question were *not* relied upon, and no attempt was made to sustain that burden. It is, therefore, clear that a holding that the City is estopped to deny that the Lease is binding for its full term, based on the presumption that these representations were relied on, would be in complete accord with *Ross v. Banta*, 140 Ind. 120, 150, 34 N. E. 865, 39 N. E. 732, and

Hosford v. Johnson, 74 Ind. 479, the Indiana cases on which the City relies (City Br. 63-4), and with the rule for which they are cited.

The City's only other argument on the question of estoppel is that "an estoppel against a municipal corporation cannot be founded upon acts done by municipal officers in excess of their authority" (City Br. 64). Here, too, an acceptance of the City's contention and the Indiana cases on which the City relies would not preclude a holding that the City is estopped to deny the present binding effect of the Lease. The City does not point out which of the many acts of its municipal officers during the 22-year period in question are claimed to have been done in excess of their authority. Its only contention on this subject—that certain provisions of the Acts of 1905 prevented it from taking the trust property subject to the obligations under the Lease—has already been shown to be unfounded (*supra*, pp. 40-41). Moreover, the City's argument addressed to the "estoppel against a municipal corporation" overlooks the City's admission that Citizens Gas conveyed all its property to the City "subject to all outstanding legal obligations of that Company" (I R. 243), among which obligations are those predicated on the estoppel *against Citizens Gas*, which is not a municipal corporation.

There can be no doubt under the law of Indiana that a municipal corporation may be estopped when it has taken affirmative action influencing another which renders it inequitable for the corporate body to assert a different set of facts. Thus, in *State v. Town of Hessville*, 191 Ind. 251, 131 N. E. 46 (1921), the court said (pp. 47-48):

> "[5] For some purposes the doctrine of estoppel is applicable to municipal corporations, not because of the mere nonaction of its officers to assert a right, but because of some affirmative action influencing another, which renders it inequitable for the corporate body to assert a different set of facts."

See also:

Town of New Castle v. Hunt, 47 Ind. App. 249, 93 N. E. 173 (1910).

The City's assignment of error based on the alleged failure of the Court of Appeals to follow the Indiana law on "(a) the question of estoppel of a municipal corporation" (City Br. 13, Par. 4) presents no real issue. The Court of Appeals, as the City admits (*supra*, p. 43), did not base its decision as to the validity of the Lease upon estoppel, although it would have been fully justified in doing so and such holding would have been fully supported by Indiana law.

(b) The Order of the Public Service Commission is a Conclusive Determination That the Lease is in the Interest of the Public Charitable Trust and in Fulfillment of the Duties of Citizens Gas as a Public Utility and the Circuit Court of Appeals Did Not Deviate from the Law of Indiana in Determining the Significance of that Order.

(Pl. Br. 90-92) (Ind. Gas Br. 39-45)
(City Br. 67-71).

The City does not claim that the Circuit Court of Appeals, in reaching its conclusion that the Lease is valid and enforceable, attributed any particular significance to the decision of the Public Service Commission. Hence, there is nothing in the City's argument (City Br. 67-71) which even tends to suggest that the Court of Appeals deviated in any respect from the settled law of Indiana by the attribution of any—or any improper—significance to the decision of the Public Service Commission. In this branch of its argument the City follows its characteristic procedure of attributing certain straw men to the plaintiff's argument and then proceeding to demolish them.

The City admits that under the law of Indiana a decision of the Public Service Commission "is conclusive upon the courts in a collateral action" (City Br. 71). The City also concedes that the Commission's order approving the Lease determined that the Lease "was advisable and *in the public interest*" (City Br. 71, italics are the City's). This means that the Commission's order is conceded to be a conclusive determination that the Lease is "in the public interest." Since "the public" *i.e.*, the inhabitants of Indianapolis, are the beneficiaries of the public charitable trust,* it necessarily follows that the Lease has been conclusively determined to be in the interest of the beneficiaries of that trust. Thus the City's admissions are in effect an admission of one of plaintiff's two claims in respect of the Commission's order.

Plaintiff's second claim is that the Commission determined that the Lease was in fulfillment of the duties of Citizens Gas as a public utility (Pl. Br. 91-2). The state had delegated its power to control public utilities to the Commission and this determination was, therefore, an exercise of the state's paramount authority over the public charitable trust as a public utility (*supra*, pp. 37-9, Pl. Br. 66-9). As the Supreme Court of Indiana held in the *William* case (188 N. E. 215):

> "* * * Granting the existence of a trust relationship between the Citizens' Gas Company and a class of persons of which appellant is representative, *that relationship cannot qualify the power of control of the state over the Citizens' Gas Company as a public utility*; * * *."

This is the rule of Indiana law on which plaintiff relies. This rule is in complete harmony with the Indiana decisions cited by the City (City Br. 70) for the propos-

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* *Todd v. Citizens' Gas Co.*, 46 F. (2d) 855, 865 (1931).
Williams v. Citizens' Gas Co., 206 Ind. 448; 188 N. E. 212, 213, 215 (1933).

tion that the Commission's order was an administrative or legislative order.* The fundamental fact is that, as a matter of Indiana law, the Commission's order approving the Lease constituted an exercise of "the power of control of the state over the Citizens' Gas Company as a public utility."

Although the City has assigned no error to the holding of the Court of Appeals "that the lease contract covered a term of 99 years" (IV R. 1294), it argues that the Public Service Commission approved the Lease for some undetermined period less than 99 years (City Br. 69-70). The fact is, however, that the Commission expressly approved the making of the Lease "*for a period of ninety-nine years*" (Bill, Exhibit D, First Par., I R. 116, Offered, II R. 327). The significance of this fact is emphasized by the fact that Fishback had objected before the Commission concerning the length of the term of the Lease (PX Stip. 13, II R. 656-7, Offered, II R. 328, 331) and that he renewed this objection in his petition for a rehearing following the announcement of the Commission's decision (PX Stip. 13, II R. 660). Obviously, if it had been intended to limit the term of the Lease, provisions to that effect would have been included in the Lease and the Commission's order approving the Lease, whereas the fact is that both the Lease and the order contain provisions expressly providing for a term of 99 years.

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* In discussing the Public Service Commission the City says (City Br. 68): "It is neither legislative nor judicial in character." Two pages later the City says (City Br. 70): "* * * the Public Service Commission is 'purely an administrative or legislative body without judicial power.'" It is the settled law of Indiana that the approval of a lease by the Public Service Commission is a legislative act. Thus, in *Fishback v. Public Service Commission*, 193 Ind. 282, 138 N. E. 346, the court said (p. 347):

> "[1, 2] The approval of a lease of the property of one public utility corporation by another is a legislative act, from which no appeal lies to the courts, * * *."

The act of the Public Service Commission in approving the making of the Lease "for a period of ninety-nine years" was an exercise of the state's power to control the public charitable trust as a public utility. Under the law of Indiana, its approval of the Lease is conclusive as to the power of Citizens Gas to enter into the Lease and make it binding for its full term of 99 years. It is clear that the Circuit Court of Appeals did not attribute any greater significance to the order of the Public Service Commission than is warranted under the settled law of Indiana.

(c) The Circuit Court of Appeals Did Not Depart From the Indiana Law in Dealing With the Doctrine of Res Judicata.

(Pl. Br. 74-90, 92) (Ind. Gas Br. 45-54)
(City Br. 72-86).

The City assigns as error the alleged refusal of the Circuit Court of Appeals to follow the Indiana law on "(b) the doctrine of *res adjudicata*" (City Br. 13, Par. 4). However, it is clear that the Court of Appeals did not decide that the prior decisions were *res judicata* (*supra*, pp. 26-8), although it would have been warranted in doing so. The court's statement that "the few cases discussed in the opinion above are determinative of the immediate issue here" (City Br. 72) is undoubtedly correct and, as the court said, "No amount of verbal magic resorted to by counsel for the City will avail to brush aside the barrier these cases present to him" (IV R. 1300). In making these statements, however, the court was not holding that these cases were *res judicata*, but was recognizing that these Indiana decisions sustaining the validity of the very Lease here in question are controlling under the rule of *Erie Railroad Co. v. Tompkins*. The City presents the amazing argument (City Br. 72) that in thus acknowledging these Indiana decisions as controlling upon it, the Court of

Appeals failed to comply with the requirement that it must follow the decisions of the Indiana courts.

The City's extended argument that the *Todd* and *Cotter* cases are not *res judicata* (City Br. 79-86) is irrelevant. Plaintiff does not claim that the decision in those cases is in and of itself determinative of the validity of the Lease and plaintiff made no such argument in its original brief nor did the Circuit Court of Appeals so hold. Likewise, as we have pointed out (Pl. Br. 92), from plaintiff's point of view the primary importance of the *Fishback* case does not lie in its effect as *res judicata*. We shall, therefore, limit our discussion to the City's contention—that the Court of Appeals did not follow the Indiana decisions on the doctrine of *res judicata*—as it relates to the decision in the *Williams* case. The complete answer to this contention is that the Court of Appeals did not hold that the decision in the *Williams* case was *res judicata*. However, we shall show that such holding would have been in full accord with the law of Indiana.

1. **Under the Indiana law, it is immaterial whether the City presents new issues as to the binding effect of the Lease on the trust, and in fact it presents no such new issues.** (Pl. Br. 76-81) (City Br. 75-8).

The City's contention that the decision in the *Williams* case is not *res judicata* because "The issues in the *Williams* case were essentially different from the issues in this case" (City Br. 75) has no foundation either in law or facts. In our original brief we showed by numerous quotations from the pleadings in the *Williams* case that the supposed new issues—"The enforceability of the lease against the City" (City Br. 75-6), "the right of the initial trustee to bind the City to the terms of the lease" (City Br. 76), and "*the validity of the lease after the transfer to the City*" (City Br. 78, italics are the City's)—had in fact been determined in the *Williams* case (Pl. Br. 76-9). The City's argument,

which is devoid of any record references to support it, contains no attempt to refute our proof of this fact.

It is also clear, *as a matter of Indiana law*, that even if the City were presenting new issues in this case, such fact would be wholly immaterial to the binding effect of the decision in the *Williams* case. This rule of law was fully discussed in our original brief (pp. 79-81). The City ignores our argument on this question, ignores the Indiana cases cited in our brief which established the rule on which we rely, and cites no Indiana case to support its theory that if there were some new issue in this case, the presence of such issue would have some effect on the question of *res judicata*.

It, therefore, clearly appears that there is no basis, either in fact or in the law of Indiana, for the City's claim that there are new issues in this case the presence of which destroys the binding effect of the decision in the *Williams* case.

2. The City's theory that the transfer of the trust property affected the conclusiveness of the decision in the Williams case is unsound and has no support in the law of Indiana. (Pl. Br. 82-3) (City Br. 76, 81-83).

The City contends (City Br. 81) that at the time of the *Williams* case "the rights of the City had not accrued and thus its rights were not and could not have been adjudicated." This contention finds no support in the Indiana law and is refuted by the following facts: (1) the City was expressly made a party to the *Williams* case in its capacity as "the trustee of said Public Charitable Trust" (PX Stip. 35, II R. 763, Offered, II R. 328), (2) when the defendants filed their first pleading in the *Williams* case (Stip. 14(b), II R. 631), the City had already demanded the transfer of the trust property (PX Stip. 22, II R. 670, Offered, II R. 327) and had procured a judicial determination of its right to enforce that demand (Stip. 13(b), II R. 630), and (3)

the unsuccessful appeal from that determination was finally disposed of (Stip. 13(i), (j), II R. 630) before the defendants filed their demurrers in the *Williams* case (Stip. 14(d), (e), (f), II R. 632).

In addition, as we pointed out in our original brief (p. 82), the City's argument ignores the familiar rule of law that a transferee of property takes that property subject to any judgment which affected it while it was the property of the transferor. If the City's theory were accepted, any owner of property against whom a judgment was rendered affecting that property could free the property from the judgment by the simple expedient of transferring it to a third party. No such theory has been accepted by the courts, nor does the City cite any authority which supports any such theory.

It is significant that although the City purports to insist upon full compliance with the law of Indiana, it has not even mentioned the two Indiana cases cited in our original brief (p. 82) which show that in Indiana a transferee of property is bound by any judgment which affected that property in the hands of his transferor. *Kitts v. Willson*, 140 Ind. 604, 39 N. E. 313, one of the two cases cited in support of the City's argument on this question (City Br. 81-2), lends no support to the City's contentions but, on the contrary, fully supports the rule of law on which plaintiff relies. It should first be noted that, as shown by the City's quotation from the opinion (City Br. 82), the City is wrong when it says that Sarah Kitts brought her suit for partition *after* receiving the deed from Duncan (City Br. 82). The opinion specifically states that the suit for partition was filed in 1880 and that the deed from Duncan was delivered to Sarah Kitts in 1887 (39 N. E. 314).

The fact which distinguishes the above case from the case at bar is stated in the portion of the opinion quoted by the City (City Br. 82):

"* * * In this case she steps into the shoes of Duncan, *who was not a party to the former suit.* Whatever rights he would have, if appellant here, such rights, and no other, she has." (39 N. E. 314.)

In the case at bar, both Citizens Gas and the City were parties to the former suit and *Kitts v. Willson* does not, therefore, apply to this case. Beyond that, in *Kitts v. Willson* the Indiana court recognized the rule upon which plaintiff relies—that a transferee of property takes that property subject to any adjudications against it in the hands of the transferor—when it said (speaking of Sarah Kitts and Harden Duncan) "Whatever rights he would have, if appellant here, such rights, and no other, she has." To paraphrase this statement, as applied to the case at bar: Whatever rights Citizens Gas would have, such rights, and no other, does the City of Indianapolis have.

The only other case on which the City relies is *Maple v. Beach*, 43 Ind. 51 (City Br. 82), which is distinguishable because the parties in that case were not the same as the parties to the former suit there involved. This case is cited for the City's contention that (City Br. 82):

"The benefit to be derived from a judgment must be mutual before it can operate as an estoppel."

This proposition on which the City relies presents a good rule by which to test the City's theory as to the effect of the subsequent transfer of the trust property. If Williams had succeeded in obtaining a decision that the Lease was invalid, the City would undoubtedly rely on such decision as *res judicata* and would vigorously deny that the question of validity could be litigated again merely because the City had received the trust property after the *Williams* case was decided. Thus, the test of mutuality for which the City contends reveals the fallacy of the City's theory as to the effect of the transfer of the trust property.

3. Under the law of Indiana, the judgment in the Williams case binds the trust and any trustee thereof, although defendants therein presented no issues to the trustee and prospective successor trustee, their co-defendants.

(Pl. Br. 83-89) (City Br. 76, 81-84).

The City argues that the decision in the *Williams* case is not *res judicata* because the parties to this case were co-defendants in the *Williams* case and presented no issues between themselves in that case (City Br. 76. Par. 3). In arguing this proposition, the City makes no attempt to deal with the facts shown by the *Williams* case and the rule of law applicable thereto upon which plaintiff relies. In our original brief we showed that Williams was permitted to sue in behalf of the public charitable trust, that both the initial trustee and the successor trustee were parties to that suit, and that in such a situation the decree of the court binds the trust and any trustee thereof, without regard to whether the initial trustee or the successor trustee took a position adverse to its co-defendants (Pl. Br. 83-9). The City makes no mention of these facts or of this well established rule of law, and its argument is, therefore, irrelevant.

None of the authorities on which the City relies deals with a situation comparable to that presented in the case at bar and those authorities are, therefore, immaterial to the question under discussion. On the other hand, the City fails even to mention the authorities cited in our original brief (Pl. Br. 86-8) which clearly establish the rule of law directly applicable to this case, namely, that in a suit by a beneficiary of a trust in behalf of the trust, the judgment binds the trust and any trustee thereof, without regard to the issues, if any, raised between the trustee and its co-defendants. In our original brief we said (Pl. Br. 84): "The City has never cited any authority denying this well established rule," and that statement still stands.

The City's proposition that no binding decree can be entered in a suit brought by a beneficiary of a trust in behalf of the trust if no issues are presented to the trustee by his co-defendants is clearly unsound and finds no support in the law of Indiana.

As we have seen, the Circuit Court of Appeals did not hold that the decision in the *Williams* case is *res judicata* (*supra*, pp. 26-8) and, therefore, that court cannot have refused to follow the Indiana decisions as they relate to the effect of the *Williams* case as *res judicata*. We have, however, briefly considered each of the City's arguments in its attack upon our contention that the decision in the *Williams* case is *res judicata* and we have shown that the City's arguments on this question are wholly devoid of any foundation, either in fact or in the Indiana law.

V. THE INTEREST RATE ON THE COUPONS AFTER MATURITY AND ON THE JUDGMENT SHOULD BE SIX PER CENT.

(Pl. Br. 134-138.) (Ind. Gas Br. 82-83.)

We have no quarrel with the statement of the applicable Indiana law as expounded by the Circuit Court of Appeals (IV R. 1305), and by Indianapolis Gas (Ind. Gas Br. 82-83). The single issue is a question of fact whether a coupon attached to an Indianapolis Gas Bond is the same obligation as the Bond itself or a separate and distinct one. Obviously, it is the latter.

The Circuit Court of Appeals placed some emphasis on the language in the coupon: "being six months' interest on its First Consolidated Mortgage Five Per Cent Gold Bond No. ....." The quoted language is without significance in determining whether the coupon is the same obligation as the Bond or a distinct one. The language is merely *descriptio obligationis* and has no tendency to show that the coupon is merely part of the general obligation of the Bond.

We submit that the applicable rate of interest is six per cent, both on the coupons after maturity and on the judgment.

CONCLUSION.

The Lease here in question was made more than 27 years ago. During the first 22 years of that time Citizens Gas, as it admits (Bill, Par. 11, I R. 12, 224) accepted and enjoyed the profits and use of the property as granted under said 99 year Lease, and was relieved from the waste and expense of competition and duplication of facilities, and it operated and maintained the leased plant and property as a unified part of its own plant and system without regard to the preservation of the leased property as an independent, separable and competitive system. Throughout this period every one proceeded on the basis that there was a valid Lease for the full term of 99 years. As stated by the Circuit Court of Appeals (IV R. 1294):

> "* * * And until this litigation was started it appears that every one proceeded on the basis that the lease contract covered a term of 99 years."

During the entire period of 27 years the City of Indianapolis and the residents and inhabitants thereof have had the full benefit and advantage of such operations and of the profits produced thereby. The Lease was originally approved by both the directors and trustees of Citizens Gas Company and by the Public Service Commission of Indiana. There has never been a suggestion throughout this case that any director or trustee of Citizens Gas Company or the Public Service Commission was actuated by anything but the highest motives in making or approving this Lease. The reports of Citizens Gas to its stockholders issued at about the time the Lease was made (Pl. Br. 6-7) are eloquent of the advantages which would flow to Citizens Gas and to the public from the making of the Lease here in question.

We submit that Citizens Gas clearly had authority to make the Lease here in question and that the Lease is enforceable against the trust property and against the City as successor trustee. The technical objections urged by the City to the binding character of the Lease and to the procedure of the Court of Appeals are without substance and the judgment of the Court of Appeals (except as to the rate of interest just discussed) should be affirmed.

Respectfully submitted,

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Filed February 5, 1941.

APPENDIX A.

REPRINT OF THOSE PARTS OF BRIEFS IN CIRCUIT COURT OF APPEALS, FILED PRIOR TO THE DECISION OF THAT COURT, DEALING WITH PLAINTIFF'S MOTION TO STRIKE AND THE REVIEW OF DISTRICT COURT'S ORDER DENYING THAT MOTION.

Brief of Plaintiff-Appellant (Chase).
Filed January 10, 1940.
(pp. 161-168.)

IV. THE DISTRICT COURT ERRED IN REFUSING TO STRIKE FROM THE CITY'S ANSWER AND COUNTERCLAIM THE ALLEGATIONS AS TO THE BURDENSOMENESS OF THE LEASE.

Plaintiff moved the Court to strike from the City's answer and counterclaim all the allegations that the rentals required by the Lease are excessive or that the Lease is burdensome (II R. 317). This motion was overruled, but the Court directed that the evidence as to this alleged reason for the City's claim that the Lease is not enforceable against it should be deferred and presented for determination at a later date (II R. 320, 321-2). However, it is clear that none of these allegations is in any way material to the issue as to the validity and enforceability of the Lease, that no evidence in support of those allegations is admissible in this case, and that the District Court should have granted plaintiff's motion to strike.

1. Prior Determinations that the Lease is Not Burdensome are Binding upon the City.

We have already shown that the order of the Public Service Commission approving the Lease conclusively determined that the Lease is in the public interest. That

order contains an express finding that the value of the lessor's properties justified the rental to be paid (I R. 118). It was within the Commission's jurisdiction to determine, and it did determine, that it was in the public interest for Citizens Gas to lease the property of Indianapolis Gas on the terms approved by the Commission, and that determination is conclusive in the case now before this Court. Since the "public interest" is synonymous with the interests of the residents of the City of Indianapons, the Commission's finding that the Lease was in the public interest was in effect a decision that the Lease was beneficial to the trust estate of which those residents were the beneficiaries.

In this connection it will be remembered that on the demurrers to the *Williams* complaint the Indiana courts held that the Lease was valid and binding, despite Williams' allegations (II R. 780) as to the burdensomeness of the Lease. Thus, in *Williams v. Citizens' Gas Co.*, 206 Ind. 448, 188 N. E. 212 (1933), the court said (p. 216):

> "* * * Further it was within the jurisdiction of the public service commission to consider and approve the lease and the complaint discloses that the public service commission did approve it. The complaint does not make out a case for any relief on the basis of invalidity of the lease or of the action of the commission in approving the same."

Thus the Supreme Court not only held that the ruling of the Public Service Commission was binding and conclusive, but also held that any evidence as to the alleged burdensome character of the Lease would not establish the invalidity of the Lease and that no such evidence could be received. This decision upon the precise point here under consideration was made at the behest of the City itself (PX Stip. 38, III R. 813; PX 135, quoted *infra*, pp. 169-70).

2. The City is Precluded by its Laches and the Laches of Citizens Gas from Raising any Issue as to the Alleged Burdensomeness of the Lease.

The laches of Citizens Gas and the City have already been fully discussed (*supra*, pp. 73, 154), but a few additional details should be noted here.

When his petition for a rehearing was denied by the Public Service Commission, Fishback at once filed suit to set aside the Commission's order. Among other things, Fishback contended that (II R. 661):

> "4. The *rental and fixed charges* to be paid as part of the rental ordered and permitted to be paid by the terms of the lease and order, *are unreasonable and unlawful, and their payment will result in a waste and misapplication* of the funds, earnings and property of the Citizens Gas Company, and an irreparable injury to its stock and certificate holders, including plaintiff."

Fishback also alleged that (II R. 665-6):

> "* * * *the obligation taken on by the Citizens Gas Company under said order and lease,* * * * *impairs the obligation of the contract existing between* the Citizens Gas Company and this plaintiff and other stockholders, and between *the company and the City of Indianapolis*, in the following particulars:
>
> * * *
>
> "2. It constitutes such lien and incumbrance upon the property and earnings of said company that the city can not at the end of twenty-five years from the date of the franchise of the company take over the plant and system of the company as provided in section 22 of the franchise of said company, as shown in Exhibit No. 2 hereto attached."

The City denied these allegations as to the burdensomeness of the Lease (Stip. 9(c), II R. 625) and thereby took a position directly opposed to the position it takes in the case at bar.

We submit that the laches of Citizens Gas and the City for a period of 22 years precludes both of them from contending that the Lease is burdensome or unfair in any respect.

3. The City, as Successor in Interest to a Party to the Lease, Could Not Escape the Obligations of the Lease Even if it Were Able to Show that those Obligations Were or Are Burdensome.

The law is well established that a party to a contract —otherwise valid—or the successor in interest to that party, cannot escape the obligations of that contract by proving that those obligations were burdensome in the first instance or became burdensome later.

If it could be shown that the Lease is *now* burdensome, that fact alone would be without legal significance. If the Lease was fair at the time it was made (the determination of the Public Service Commission that it was fair is conclusive on this point), it cannot be claimed that it is unfair now because it appears to be burdensome at the present time. It would be no evidence of unfairness to show that the leased property at the present time has depreciated in value, in the absence of some showing that this depreciation is due to some fault of the lessor, a showing which could not be made in view of the fact that it was the duty of the lessee "to maintain and keep the demised premises in as good order, repair and condition" as they were at the time the Lease took effect (I R. 64).

If it could be shown that the Lease was burdensome *when executed* (thus making a collateral attack upon the express finding of the Public Service Commission), that fact would also be without legal significance. The rule is clearly established that a contract binds the parties thereto, even though one of them comes to believe that he is paying far more than the consideration he receives is worth, and even though that is the fact.

1 *Restatement of the Law of Contracts*, Sec. 81;
Hamilton v. Hamilton, 162 Ind. 430, 70 N. E. 535, 537 (1904);
Warner v. Marshall, 166 Ind. 88, 75 N. E. 582, 592 (1905);
Smith v. Smith, 340 Ill. 34, 172 N. E. 32, 34 (1930).

Similarly, a lessor cannot set aside a lease because he considers the rent to be inadequate, and a lessee cannot avoid the obligations provided for in his lease because he thinks that they are burdensome.

Lowther Oil Co. v. Guffey, 52 W. Va. 88, 43 S. E. 101, 102 (1903);
Smith v. Collins, 148 Ala. 672, 41 So. 825 (1906).

The rule which these cases announce is so clearly established as to require no further discussion at this time. The cases reviewed below (*infra*, pp. 166-7), involving municipal corporations, are, of course, additional authorities in support of the rules just referred to. Municipal corporations are in the same position as individuals in so far as their contractual obligations are concerned and are held just as responsible for performance of their contracts as are individuals or private corporations.

Safety Insulated Wire & Cable Co. v. Baltimore, 66 Fed. 140, 144 (C. C. A. 4th, 1895) (certiorari denied 165 U. S. 720);
Indianapolis v. Indianapolis Gas-Light & Coke Co., 66 Ind. 396, 407 (1879);
Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 107; 39 N. E. 433, 436;
State ex rel. v. Kansas City, 319 Mo. 386; 4 S. W. (2d) 427, 431.

Since municipalities and individual persons are on the same footing with respect to the necessity of fulfilling their contractual obligations, and since an individual can-

not refuse to carry out his contract because he has not made a good bargain for himself, it, of course, follows that a municipal corporation may not refuse to comply with the provisions of a contract on the ground that it is, or is thought to be, burdensome.

Eau Claire Dells Improvement Company v. Eau Claire, 172 Wis. 240, 179 N. W. 2 (1920). This was an action to enjoin the city of Eau Claire from forfeiting plaintiff's contract with the city. The contract was entered into in February, 1877 and provided that the plaintiff should build and maintain a dam and that it should have a 99 year lease of any of the resulting water power not required for the city's uses. The city made no complaint about the lease until 1906, when it declared the contract forfeited.

The Supreme Court said that this contract was a business matter, as contrasted with the exercise of governmental functions, and that in matters of this sort a city is governed by the same rules as an individual. The court ruled that *the city could enter into a contract of this sort for a period of 99 years and that it was estopped to object to the validity of the lease.* The court also said (179 N. W. 7):

> "It may be from the present viewpoint, more than forty years after the contract has been in effect, that it could be said the city made an improvident contract. But it cannot be said that good judgment would have so pronounced at the time it was made. But be that as it may, it was entered into in good faith, without fraud, in furtherance of the legislative purpose and in a proprietary capacity. In such capacity *it is deemed competent for a municipality, as well as for a private individual, to make a valid improvident contract.*"

In *Fooshee & Hungerford v. Victoria*, 54 S. W. (2d) 220, the Texas Court of Civil Appeals said (p. 223):

> "However inadvisable and shortsighted it may have been on the part of a city administration to have

made the contract with appellants, it was executed by the city, and *it has no more power to arbitrarily cancel and repudiate the contract than any citizen would have.*"

Terre Haute v. Terre Haute Water-Works Company, 94 Ind. 305 (1884). This case involved the city's sale of its shares of stock in a water-works company. Unfortunately the opinion omits many of the facts but it appears that the sale of the stock was upheld. At any rate, the Court held that the city had authority to make such a sale and that as an incident to such authority it had the right to decide upon what terms the sale should be made. On this point the Court further said (p. 307):

"Where a discretionary power is conferred upon a municipal corporation courts will not interfere with its exercise. *Sales made by a municipal corporation*, in the exercise of a discretionary power vested in it, *can not be annulled upon the ground that the bargain was an improvident one.*"

Thus, it is clear that in September, 1935, the City could not for the first time attack the validity of the Lease because of its alleged burdensomeness. The advantageous or burdensome character of a contract is of no importance in determining whether the contract is binding, either before or after the transfer of the assets of one of the contracting parties.

We submit that the District Court erred in refusing to strike the City's allegations as to the burdensomeness of the Lease from its Answer and Counterclaim; and we submit that this Court should correct this error of the District Court to the end that there may be a speedy and final determination of this already too protracted litigation.

Brief of Defendant-Appellant Indianapolis Gas Company.

Filed January 10, 1940.

(pp. 176-178.)

VI.

THE AVERMENTS OF THE CITY THAT IT HAS A RIGHT, AS SUCCESSOR TRUSTEE, TO REJECT THE LEASE AND AVOID LIABILITY THEREUNDER ON THE GROUNDS THAT SAID LEASE IS BURDENSOME AND NOT ADVANTAGEOUS TO THE TRUST, EVEN IF SAID FACTS ARE TRUE, PRESENTS NO VALID GROUND OF DEFENSE.

In the order of the District Court made on January 18, 1938 (II R. 321-2) it was provided that the trial be deferred on the one issue regarding inforcibility of the lease arising from the claim of the City that it had the right as successive trustee to refuse and reject an assignment of such lease on the grounds that such lease was burdensome and not advantageous to the trust.

Reference is made to this order and reserved issue only to point out that it is not such an issue as, upon reversal of the judgment appealed from, would require a new trial of the cause. The rule has been long established in Indiana, as it is elsewhere, that after parties have entered into a contract *without fraud*, no defense to the obligations thereof is created by reason of the fact that in subsequent course of events the consideration moving from one party may, either in the opinion of that party or in fact, have become excessive. No party to a contract may be relieved of obligations created thereby simply because he subsequently believes that his bargain was not so advantageous as he had supposed when entering into the agreement. This principle is elementary and without it all stability of value or contracts would end.

The rule is succinctly stated in *Mullen v. Hawkins*, 141 Ind. 363 at 366:

> "Where a party, voluntarily, and without fraud or deception enters into a contract and receives all he contracted for he can not be relieved on the ground of inadequacy or want of consideration."

Courts will not inquire into the adequacy of a bona fide consideration after it has been accepted and utilized for over twenty-three years.

When it is remembered that both the City and the Citizens Gas have defended this lease on every occasion it has been attacked during the first twenty-three years of its existence, realization is had of the actions and representations taken and made by the City from the time of the resolution of its Board of Public Works on March 29, 1929, until acceptance of the instrument assigning said lease and its taking possession of said property on the 9th day of December, 1935, this alleged "ground" of defense seems indeed amazing.

Furthermore this issue was specifically raised and adjudged in each the *Fishback* and *Williams* cases both. It was also decided by the City in determining whether it would or would not accept the trusteeship of said trust. Its decision was necessarily arrived at by weighing both the benefits and liabilities of the leasehold, as well as by determining the value of other parts of the trust estate. The action of the City on March 29, 1929, and in issuing its bond in order to effect its succession to the trusteeship is conclusive on that question.

The City's own statement as made in its brief in words to strike out (*Todd v. Citizens Gas*) is particularly pertinent.

> "Under the provision of Section 53 of the Act of 1905, the City Council has the power to determine whether to accept the trust and agree to the terms and conditions which bind the City. *It is for the City Council to determine whether the offer to the City is of value and should be accepted.*"

Having determined that the trust in its entirety was of value, and having accepted the same, the City may not now deny its acts or the legal results following therefrom.

It is therefore respectfully submitted that upon reversal of the judgment here appealed from, said reserved issue is not such a one as would require the ordering of a new trial of this cause.

Answer Brief of Defendant-Appellee City and the Individual Defendants who are Members of the Boards of Trustees and Directors of the Department of Utilities of said City in Cause No. 7143.

Filed February 29, 1940.

(pp. 118-119.)

VI. The District Court did not err in refusing to strike from the City's Answer and Counter-claim the allegations as to the burdensomeness of the lease. (Plaintiff's brief, p. 161.)

It is the well settled rule in Indiana that it is not reversible error to overrule a motion to strike out a part of a pleading.

Guenther v. Jackson, 73 Ind. App. 162, 164, citing *Woodhouse v. Jennings*, 164 Ind. 555, and also *Ohio Valley Trust Co. v. Wernke*, 179 Ind. 49.

While it is conceded that the manner of pleading is controlled by the adjective law of the state, the question of whether or not the refusal of the court to strike out parts of a pleading is erroneous is substantive law. That being true, this court is bound by the state rule.

Erie Railroad Co. v. Tomkins, 304 U. S. 64.

As the District Court reserved the question for future determination as to the burdensome of the lease, the ruling on the motion to strike could not have resulted in reversible error.

Reply Brief of Plaintiff-Appellant (Chase).

Filed March 26, 1940.

(pp. 54-55.)

VIII. THE DISTRICT COURT ERRED IN REFUSING TO STRIKE FROM THE CITY'S ANSWER AND COUNTERCLAIM THE ALLEGATIONS AS TO THE BURDENSOMENESS OF THE LEASE.

(Pl. Br. 161-8.) (Ind. Gas Br. 176-8.) (City's Br. 118-19.)

The City does not attempt to support the District Court's ruling on the motion to strike; it argues merely that the decision is not reversible error. Thus plaintiff's contentions:—(1) that the City's allegations that the Lease is burdensome are not material to the issue as to the validity of the Lease, and (2) that no evidence should be admitted in support of these allegations—stand admitted for want of any attempt to refute them. (See Pl. Br. 161-8.) Moreover, it is clear that even the argument that the District Court's error is not reversible error is not well taken.

The error in refusing to strike these immaterial allegations was not cured by the Court's order that the evidence on these allegations should be presented at a later date, and the fallacy of the City's argument that the error is not reversible because of that order (City's Br. 119) is obvious. The alleged Indiana rule that such an error as this is not reversible (City's Br. 118) has no application in a federal court. On this point the City cites *Erie Railroad v. Tompkins*, 304 U. S. 64, and asserts that (City's Br. 119) "whether or not the refusal of the court to strike out parts of a pleading is erroneous is substantive law." Of course, the City's contention that a party may escape from a contract by showing that it has become burdensome does present a question of substantive law, but one which is settled in Indiana and elsewhere against the City (Pl. Br. 165-7). However, the alleged procedural rule in Indiana upon which the City relies has nothing to do with the

merits of the question whether the Court's refusal to strike out parts of the City's answer and counter-claim was erroneous and relates solely to the question whether that error is reversible error. "The question whether an erroneous ruling on a motion to strike constitutes reversible error is a question of practice and procedure and the rule which still obtains as to such a question is clearly stated in *Dallas Ry. & Terminal Co. v. Sullivan*, 108 F. (2d) 581, 583 (C. C. A. 5th, 1940), as follows:

> "* * * all questions of preserving and assigning errors, and *whether an error is harmless or reversible*, are matters of procedure, and in regard to such matters, this court is governed by the rules of practice and procedure in the Federal Court rather than by those in the State Court."

The City does not deny that the District Court erred in refusing to strike the City's allegations as to the burdensomeness of the Lease. This error can be easily corrected merely by making a final determination of the validity of the Lease without remanding the case for evidence in support of the City's allegations that the Lease is burdensome. We submit that this Court should correct this error so that there may be a speedier determination of this already too protracted litigation and that there is no rule of law which precludes the Court from doing so.